

03269

1 IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON

2 IN AND FOR KING COUNTY

3  
4 STATE OF WASHINGTON, ) No. 96-2-15056 SEA  
5 )  
6 Plaintiff, )  
7 )  
8 vs. )  
9 )  
10 AMERICAN TOBACCO CO.; BROWN & )  
11 WILLIAMSON TOBACCO CORP.; LIGGETT )  
12 & MEYERS, INC.; LORILLARD TOBACCO )  
13 CO., INC.; PHILIP MORRIS, INC.; )  
14 R.J. REYNOLDS TOBACCO CO.; B.A.T. )  
15 INDUSTRIES, P.L.C.; HILL & )  
16 KNOWLTON, INC.; THE COUNCIL FOR )  
17 TOBACCO RESEARCH-U.S.A., INC.; )  
18 TOBACCO INSTITUTE, INC.; foreign )  
19 corporations; and unknown corpor- )  
20 corporations; and JOHN DOE 1 - 100, )  
21 and JANE DOE 1 - 100, individuals, )  
22 )  
23 Defendants. )  
24 )

14 TRANSCRIPT OF PROCEEDINGS

15 taken before the HONORABLE GEORGE A. FINKLE, Judge,  
16 at the King County Courthouse, Seattle, Washington,  
17 beginning at 9:14 a.m., Wednesday, October 21, 1998.  
18  
19  
20  
21

22 REPORTED BY: Barry Fanning, RPR  
23 James D. Lavielle, RPR  
24 Official Court Reporter  
State of Washington

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03270

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7 State of Washington  
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11 Beninger & Cunningham

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15 Hagens & Berman  
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22 ANDREW T. FRANKEL, Esq.  
23 Simpson, Thacher & Bartlett  
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25 Todd & Wakefield

03271

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4 For the Defendant BRUCE M. GINSBERG, Esq.  
5 Hill & Knowlton: Davis & Gilbert  
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7 THOMAS J. BREWER, Esq.  
8 Wickwire, Greene, Crosby,  
9 Brewer & Seward  
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12 Lorillard: Lane, Powell, Spears, Lubersky  
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14 WILLIAM J. CRAMPTON, Esq.  
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19 Jones, Day, Reavis & Pogue  
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21 BRADLEY S. KELLER, Esq.  
22 Byrnes & Keller  
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25 Tobacco Institute: Gordon, Murray & Tilden

03272

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4 For the Defendant JOHN W. PHILLIPS, Esq.  
5 Philip Morris: Heller, Ehrman, White &  
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9 GEORGE C. LOMBARDI, Esq.  
10 Winston & Strawn  
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12 STEVE KACZYNSKI, Esq.  
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14 MAURICE A. LEITER, Esq.  
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17  
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19 Brown & Williamson: MICHELLE BROWDY, Esq.  
20 Kirkland & Ellis  
21

03273

1 I N D E X

2 Witness Name D C RD RC  
3 John Solow 3274 3294

5 E X H I B I T S

6  
7 Exhibit No. Marked Admitted Withdrawn  
8 5813 3430  
WX165 3640  
9 WX218 3640  
WX220 3640  
10 WX226 3640  
WX229 3640  
11 WX241 3640  
WX325 3640

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1 Seattle, Washington, 10/21/98, 9:14 a.m.

2 THE COURT: Please sit down.

3 DIRECT EXAMINATION (Cont.)

4 BY MR. FERGUSON:

5 Q Good morning, Dr. Solow.

6 A Good morning.

7 Q Let's try and wrap my part up so we can get  
8 on with things.

9 I've got displayed on the easel Washington  
10 Demonstrative Exhibit 5020, where you wrote, one,  
11 arrangement not to advertise on the basis of health at  
12 the Plaza in 1953.

13 Two, arrangements to mislead the public about  
14 smoking and health 1953 the Plaza arrangement to  
15 refrain from in-house testing of live animals and  
16 arrangements to share breakthroughs on safer products.

17 I want to ask you about the role of each of  
18 the defendants in this, and to do so why don't we turn  
19 to your wheel here, or, looking at this morning I  
20 decided it looks more like a space station. We'll  
21 call it a wheel.

22 In your opinion, was American Tobacco Company  
23 involved in each of the arrangements that we just  
24 described?

25 A Yes.

03275

1 Q In your opinion, was Brown & Williamson  
2 involved in each of the arrangements that we just  
3 described?

4 A Yes.

5 Q In your opinion, was Lorillard involved in  
6 each of the arrangements that we have described?

7 A Yes.

8 Q In your opinion, was Philip Morris involved  
9 in each of the arrangements we have described?

10 A Yes.

11 Q In your opinion, was R.J. Reynolds involved  
12 in each of the arrangements we've described?

13 A Yes.

14 Q In your opinion, was TIRC, later CTR,  
15 involved in each the arrangements we've described?  
16 A Let me think about that one for a second.  
17 Q Okay.  
18 A I'm not sure if I would say in all of them,  
19 certainly several of them.  
20 Q Can you identify which ones they were  
21 involved in?  
22 A I'm not sure for certain whether I would say  
23 that TIRC was involved in the gentlemen's agreement.  
24 I'd have to think that one through.  
25 Q When you say gentlemen's agreement you are

03276

1 referring to in-house testing of live animals?  
2 A I believe that TIRC, CTR were involved in  
3 numbers one and two, and I guess I'm not certain I  
4 would say that TIRC was involved in numbers three and  
5 four directly. I would have to think about that.  
6 Q You said gentlemen's agreement, is that how  
7 you are characterizing three and four?  
8 A That's right.  
9 Q Were the industry's lawyers involved in any  
10 of the arrangements that we've described?  
11 A Yes, I believe the industry's lawyers were  
12 involved in all of them.  
13 Q In all of them?  
14 A Basically.  
15 Q Was the Tobacco Institute involved in any of  
16 the arrangements we've described?  
17 A Yes, although again I think I would probably  
18 say mostly with one and two. Same concerns with  
19 regard -- same position as TIRC.  
20 Q Is there something we can call this chart so  
21 I don't refer to it as wagon wheel or space station?  
22 A It's a depiction of the cartel.  
23 Q Shall we call it the cartel?  
24 A Call it the cartel if you want to.  
25 Q You said the cartel arrangement?

03277

1 A I just said cartel, you could call it the  
2 cartel.  
3 Q You drew Liggett & Myers sort of off to the  
4 side here. In your opinion, did Liggett & Myers at  
5 any time become part of the arrangements that you  
6 described?  
7 A Yes. I think I drew Liggett & Myers off to  
8 the side because at the original meeting they did not  
9 take part, but I think I left a space for them to fit  
10 in because I think they did, in the end, follow the  
11 cartel's line.  
12 Q Should I draw little arrows indicating?  
13 A If you wanted to do that you could link them  
14 somehow with a dotted line or something.  
15 Q The record should reflect I'm drawing a  
16 dotted line.  
17 Was Hill and Knowlton party to any of the  
18 arrangements that you described?  
19 A Yes, Hill and Knowlton was the public  
20 relations firm that was involved in the formation of  
21 the Tobacco Industry Research Council, and yes, I  
22 think that Hill and Knowlton was involved. I would  
23 put them somewhere in the middle. I'm not sure I left  
24 a lot of space there, but maybe next to TI, if you

25 want to a draw a line and separate that.

03278

1 Q I'll put H&K in the hub.

2 A That would be fine.

3 Q Was British American Tobacco Company part of  
4 any of the arrangements you described for the jury?

5 MS. McGARRY: Objection, leading.

6 THE COURT: Sustained.

7 BY MR. FERGUSON:

8 Q What was the role, if any, of the British  
9 American Tobacco Company with regard to the  
10 arrangements that you talked about?

11 A I think British American Tobacco Company  
12 linked this arrangement to much of the rest of the  
13 world, they were involved with the price fixing in  
14 Latin America that we discussed, they were involved  
15 with the advertising in Holland that we discussed that  
16 was an attempt to suppress health advertising, taking  
17 competitive advantage of health advertising in  
18 Holland. They were involved in the agreement not to  
19 do health-related research in Saudi Arabia with regard  
20 to the compensation question.

21 So I think that they were involved insofar as  
22 they helped to suppress competition on smoking and  
23 health elsewhere in the world, including with some of  
24 the American companies, and by doing that helped to  
25 suppress competition generally in this country as

03279

1 well.

2 Q Should I link BATCo to this cartel depiction  
3 in any fashion?

4 A I'm trying to think about how you would do  
5 that exactly. You want to put them on the side and  
6 draw a link in toward -- I don't know if I want to  
7 draw a link to each other industry or each other firm  
8 or link to the middle, but somehow.

9 Q Well, this is your drawing, even though I'm  
10 doing it. Tell me where you want it.

11 A Draw a line from that to the middle, I think  
12 they were connected to the rest of the industry. I'm  
13 not sure that graphically that's necessarily the best  
14 way to put it, but they certainly had contacts with  
15 the rest of the industry. The alternative is to draw  
16 lines around every company, then it starts to get  
17 messy. So --

18 Q Did the conduct of British American Tobacco  
19 Company in Europe, that you just described, in your  
20 opinion have any affect on the American cigarette  
21 market?

22 A Yes, it did. I think it did. I think that  
23 one of the concerns as you read the documents and  
24 discuss the transcript of the conversations, for  
25 example, having to do with the Dutch advertising about

03280

1 safety and health was the concern that if that sort of  
2 advertising happened in Europe and it wasn't stopped,  
3 it would run over into this country and there could be  
4 a free-for-all and that was something to be avoided,  
5 so yes, I think suppressing that kind of advertising  
6 in Europe helped to prevent the firms from doing that  
7 sort of advertising here.

8 Q What arrangements in Europe, such as you  
9 testified about yesterday, so-called gentlemen's

10 agreement regarding sharing innovation and biological  
11 research, would that effect the American market or  
12 not?

13 A Yes, it would. If foreign firms are avoiding  
14 competition on smoking and health, then they are less  
15 likely to invent safer cigarettes to market in this  
16 country as well. So I think it's important, it would  
17 be important for these American companies to know that  
18 this was -- that they were not likely to face the same  
19 sort of -- not likely to face people taking  
20 competitive advantage and trying to innovate in other  
21 countries as well.

22 Q Go back to the arrangement chart here.

23 For the record, the cartel chart is  
24 Washington Demonstrative Exhibit 5021. And I've put  
25 back now to Washington Demonstrative Exhibit 5020 for

03281

1 the arrangements that you have written.

2 Let's focus on number one, arrangement not to  
3 advertise on the basis of health, 1953, Plaza.

4 Would you describe for the jury the  
5 pro-competitive aspects of that arrangement, those  
6 things that favor competition?

7 A I don't think there are any pro-competitive  
8 aspects of that arrangement.

9 Q Is this arrangement anti-competitive?

10 A Yes, I think that arrangement is  
11 anti-competitive.

12 Q Number two, arrangement to mislead the public  
13 about smoking and health, 1953, Plaza.

14 What are the pro-competitive aspects of that  
15 arrangement?

16 A I don't believe there are any pro-competitive  
17 aspects of that arrangement.

18 Q Is that arrangement anti-competitive?

19 A Yes.

20 Q Number three, arrangements to refrain from  
21 in-house testing of live animals. What are the  
22 pro-competitive aspects of that arrangement?

23 A I'll emphasize again, while I didn't write it  
24 that one should understand that to mean for the  
25 purposes of research in smoking and health. I don't

03282

1 think there are any pro-competitive aspects of that,  
2 of that arrangement, either.

3 Q Is that arrangement anti-competitive?

4 A I think it is, yes.

5 Q Number four, arrangement to share  
6 breakthroughs on safer products.

7 What are the pro-competitive aspects of that  
8 arrangement?

9 A I don't think there are pro-competitive  
10 aspects of that arrangement, I think that arrangement  
11 is anti-competitive.

12 Q What is the purpose of the antitrust laws?

13 MR. WEBB: Objection.

14 THE COURT: Sustained.

15 MR. FERGUSON: Ask the witness to examine an  
16 extract of a learned treatise which was designated as  
17 Washington Demonstrative Exhibit 5000. I have here --  
18 I'll show the defendants, I only have one copy, I have  
19 the title page and the portion I want to use.

20 Before I hand it to the witness, since this

21 is the only copy I have I'll hand it to the Court so  
22 if Mr. Webb and I have a dialogue the Court will have  
23 it before you.

24 THE COURT: Thank you.

25 MR. FERGUSON: I've highlighted the portion

03283

1 I intend to call the witness's attention to.

2 THE COURT: Okay.

3 MR. FERGUSON: May I hand it to the witness?

4 MR. WEBB: My only objection, you refused --  
5 objection on the grounds you instruct the jury on the  
6 law.

7 THE COURT: He may hand it to the witness.

8 I'm not saying the witness may read it.

9 MR. WEBB: Thank you.

10 BY MR. FERGUSON:

11 Q Dr. Solow, I didn't have any more room in my  
12 briefcase for a book of that size. I've given you the  
13 cover page and a couple of pages, can you identify  
14 what you are looking at? Identify and identify in  
15 terms of reading the title of the document.

16 A This is the cover page and the copyright page  
17 and then some text from a book entitled Antitrust Law  
18 Policy and Procedure Cases Materials and Problems,  
19 third edition, by E. Thomas Sullivan, dean and  
20 professor of law, University of Arizona, and my good  
21 friend, colleague co-author Herbert Hovenkamp was  
22 Dorothy Wielle, professor of law at the University of  
23 Iowa.

24 Q Is that treatise generally accepted as  
25 authoritative by economists in the antitrust field?

03284

1 A I would say to be strictly honest about it,  
2 this is an earlier edition, I think Herb's latest  
3 edition has a slightly different title. I taught out  
4 of this book in classes that I've taught at Iowa.

5 Q In the classes you teach do you teach, among  
6 other things, the purpose of antitrust laws?

7 A When I'm teaching organization and antitrust  
8 legal and economic analysis, certainly.

9 Q Does Professor Hovenkamp, in the text before  
10 you, include a section where he discusses the purposes  
11 of antitrust laws?

12 A Yes.

13 MR. FERGUSON: May I ask the witness to read  
14 that portion?

15 THE COURT: No.

16 MR. FERGUSON: Thank you.

17 Q As an economist, do you have an understanding  
18 of the economic rationale underlying the antitrust  
19 laws?

20 A Certainly.

21 Q What is the economic rationale underlying the  
22 antitrust laws?

23 MR. WEBB: Same objection, round about way of  
24 doing the same in this case, you sustained the  
25 objection. I object to the form of the question.

03285

1 THE COURT: Rephrase the question.

2 BY MR. FERGUSON:

3 Q In the study of economics do you teach your  
4 students that anti-competitive arrangements among  
5 competitors are socially desirable?

6 MR. WEBB: Objection, leading.  
7 THE COURT: Sustained.  
8 BY MR. FERGUSON:  
9 Q What do you teach your students about  
10 antitrust economics with regard to social effects of  
11 antitrust behavior?  
12 MR. WEBB: Objection. This is going to get  
13 into legal issues.  
14 THE COURT: I don't want to leave it  
15 dangling. As long as you are dealing with law and the  
16 purpose of law, I'll sustain the objection. If you're  
17 able to ask a question that relates to  
18 anti-competitive behavior and economics, I will listen  
19 to you, then I'll listen to the objection as well if  
20 there is one.  
21 MR. FERGUSON: I appreciate that.  
22 Q What are the economics of anti-competitive  
23 behavior, generally?  
24 A Well, economists believe that the best way to  
25 use the resources that are -- marshalling the  
03286  
1 resources that our society has to get the most out of,  
2 what we have for our citizens is to rely pretty much  
3 wherever possible on competitive markets. The  
4 competitive markets ensure that prices are held low  
5 but still cover the costs that the firms have to bear,  
6 but no more, just to cover the costs and allow a  
7 normal competitive rate of return on investments.  
8 That competitive markets provide the goods  
9 that consumers want and that they are willing to pay  
10 for that competitive market. Within limits  
11 competitive markets encourage innovation and progress  
12 and that competitive markets leave customers free to  
13 choose among many buyers, many -- sorry -- many  
14 sellers independently striving to serve customers  
15 best, that customers have choices and the customer  
16 ultimately will be best served when markets are  
17 competitive.  
18 Anti-competitive arrangements including, for  
19 example, agreements among competitors, among rival  
20 firms not to compete on price, on product quality, on  
21 innovation and the like, muck about with that, they  
22 interfere with the free choice of consumers, and  
23 consumers won't necessarily get low prices, high  
24 quality product, the innovative products.  
25 What they will get are the products that the  
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1 firms think they ought to have, and that's not a very  
2 good way for us as a society to use the resources that  
3 we have to get -- to do the best we can for our  
4 people.  
5 Q You suggested in your testimony this morning  
6 that the four arrangements listed here are each  
7 anti-competitive, and you have also told the jury that  
8 in your opinion each of the defendants in this action  
9 was a member, a party to those arrangements.  
10 Are you telling the jury that these  
11 defendants were completely successful in implementing  
12 and enforcing these arrangements?  
13 MR. WEBB: Objection to the form of the  
14 question.  
15 THE COURT: Sustained.  
16 BY MR. FERGUSON:



17 Q Is it your opinion that the defendants in  
18 this case engaged in any innovation at all, no  
19 innovation, lots of innovation? What is your opinion  
20 with regard to innovation by these defendants?

21 A I believe that the effect of these  
22 arrangements were to suppress some innovations  
23 completely, to delay others so that innovations that  
24 might have occurred sooner ended up occurring later,  
25 and generally speaking, to slow the rate of innovation

03288

1 along the lines of safety and health. In any event,  
2 safer cigarettes, along that line.

3 Q Did the four arrangements that we have listed  
4 on Demonstrative Exhibit 5020 affect the State of  
5 Washington?

6 A Yes, I think it did.

7 Q How did they affect the State of Washington,  
8 in your opinion?

9 A Well, I think that as a result of the  
10 suppression of competition on the basis of safety and  
11 health and in all likelihood there was greater injury,  
12 greater health injury to consumers, to smokers,  
13 because they did not have safer products to consume.  
14 They weren't fully informed about the consequences,  
15 they didn't really understand the consequences of  
16 smoking, or didn't understand it as soon as they might  
17 have, and as a result more people smoked and they  
18 smoked cigarettes that were more harmful to them than  
19 they might -- than might otherwise have been  
20 available, and as a result of that, more people were  
21 sick.

22 Q On what do you base your opinion that fewer  
23 people would have smoked if innovation had occurred  
24 more rapidly?

25 A Well, if you look at the path of consumption

03289

1 over time, if you look at the amount of smoking that's  
2 gone on over time, and I think we had that curve up  
3 the first day I was testifying.

4 Q Would that be Washington Demonstrative  
5 Exhibit 201?

6 A Tell me the number. It's the big chart.

7 Q How about this one?

8 A That's the one.

9 Q What are you talking about on that chart?

10 A The evidence seems to be pretty clear, and I  
11 think it shows up in this chart, I think there are  
12 economists who have studied this question as well but  
13 that when information about the hazards of smoking  
14 come to the fore, when news breaks about the hazards  
15 of smoking, customers are informed more strongly about  
16 the hazards of smoking, that consumption declines and  
17 that when that information is filtered through and  
18 when the industry raises doubts about that  
19 information, consumption starts to rise again.

20 People believe that education of consumers is  
21 an important part of getting them to know what is  
22 going on and that the balance of information that's  
23 provided to consumers has an effect, so, for example,  
24 one example we have talked about is the early 1950s  
25 when consumers were receiving information about --

03290

1 that's the spot -- when consumers were receiving

2 information about the health consequences of smoking  
3 and the industry was competing at that time on health  
4 advertising. Whether they were truthful health  
5 advertisements are or not is another matter, but the  
6 industry was telling people that their cigarettes  
7 caused less irritation, less cough, so forth, smoking  
8 declined following the meeting and with the cessation  
9 of those advertisements smoking began to rise again.

10 You have a similar effect in 1964, which is  
11 sort of --

12 Q This point here?

13 A Right about that. I think those, most people  
14 who studied this issue agree that the announcements of  
15 the surgeon general's report led to a decline in  
16 smoking, then as the industry said we don't really  
17 know, it really hasn't been proved yet that smoking is  
18 hazardous, and the report passed from people's  
19 attention and they moved on to other things in their  
20 lives, smoking began to increase again.

21 There is another little episode which has  
22 been studied by economists quite a lot which is  
23 labeled the fairness doctrine in the late '60s, right  
24 about there.

25 This was a period when the government

03291

1 authorities -- I'm not sure which government agency it  
2 was, but the government said that if the tobacco  
3 companies were to be allowed to advertise cigarettes  
4 on television then as part of what was known as the  
5 fairness doctrine anti-smoking ads had to be offered,  
6 too.

7 And there was a period when anti-smoking  
8 commercials were on television along with cigarette  
9 commercials on television, and there was again the  
10 decline in smoking as people were receiving a  
11 different mix of information, a different set of  
12 messages from the media. When those ads ended in the  
13 early 1970s, 1970, smoking rose again.

14 And so the public's consumption clearly seems  
15 to be related to what sort of messages they get, they  
16 smoke less the more they hear about, all else equal,  
17 the more they hear about the dangers of smoking.

18 Q In your opinion, is the cigarette industry in  
19 the United States today fully competitive?

20 A I certainly wouldn't say it's fully  
21 competitive, no.

22 Q Is it competitive in any aspect?

23 A I think it's certainly competitive in some  
24 aspects. I think the industry continues today, as  
25 they have for a long time, to compete on the basis of

03292

1 image, they want to convince people that smoking is  
2 glamorous, fun, liberating to women and things like  
3 that.

4 I think they probably compete on the basis of  
5 taste, they want to have products that taste good to  
6 consumers, but I think that they don't compete on some  
7 of the fundamental questions such as price and  
8 certainly on the safety of the products that they  
9 sell.

10 Q Had this meeting not occurred, assume for  
11 purposes of this question that the meeting at the  
12 Plaza Hotel in 1953 did not occur, and that the

13 arrangements that you described written on  
14 Demonstrative Exhibit 5020 were not made.  
15 Do you have an opinion, more probably than  
16 not, as to what the cigarette industry in the United  
17 States would look like today?  
18 MR. SCHIFFERMAN: Objection, repetitious.  
19 THE COURT: Overruled.  
20 THE WITNESS: One clarifying question for  
21 you, if the meeting had not occurred, the first two  
22 really took place, do you want me to assume that three  
23 and four did not take place, even though I think they  
24 were subsequent?  
25 BY MR. FERGUSON:

03293

1 Q Assume none of these arrangements occurred.  
2 A I understand.  
3 MR. KACZYNSKI: Objection, calls for  
4 speculation.  
5 THE COURT: Overruled.  
6 THE WITNESS: In my opinion, I think that in  
7 all likelihood safer products would have been  
8 developed, the information would have been more  
9 available to the customers about the health  
10 consequences of smoking, I think it's likely that  
11 fewer people would be smoking as a result of that  
12 information, and those who did smoke would be smoking  
13 safer products and would have reduced illness and  
14 disease, the sort of illness and disease that arises  
15 from smoking.  
16 BY MR. FERGUSON:  
17 Q How would that affect the State of  
18 Washington?  
19 MR. WEBB: Objection, asked and answered. He  
20 just answered this two minutes ago.  
21 THE COURT: Sustained.  
22 MR. FERGUSON: That concludes my direct  
23 examination.  
24 Thank you, Dr. Solow.  
25 MR. WEBB: I think I need your mike.

03294

1 MR. FERGUSON: Yes, I'll unhook here.  
2 CROSS-EXAMINATION  
3 BY MR. WEBB:  
4 Q My name is Dan Webb. I don't think we met.  
5 I represent Philip Morris, and I have what probably  
6 will be a fairly lengthy series of questions for you.  
7 I'll start with, would you prefer professor  
8 or doctor?  
9 A Doctor is fine. Whatever you're comfortable  
10 with.  
11 Q Would you agree that you have expressed some  
12 pretty broad opinions and conclusions about  
13 competition in the tobacco industry during the past 45  
14 years.  
15 Is that fair?  
16 A Pardon?  
17 Q In the last two days, you have expressed to  
18 this jury some very broad and definitive opinions  
19 about competition in the tobacco industry during the  
20 past 45 years.  
21 Is that fair to say?  
22 A I'm sorry, I misunderstood the opinion,  
23 saying I expressed opinions for 45 years. I am not 45

24 years old yet.  
25 I think I've expressed some opinions about  
03295  
1 the nature of competition in the tobacco industry over  
2 the last 45 years.  
3 Q They have been fairly broad and pretty  
4 definitive, would that be fair to say?  
5 A I think they have been specific, I'm not sure  
6 how more -- I think they cover a wide range of --  
7 relatively wide range of areas, and I have some  
8 specific opinions.  
9 Q I'll get to qualifications and background to  
10 reach those opinions.  
11 First of all, as an economist have you ever  
12 worked for any company that was ever a member of the  
13 tobacco industry?  
14 A No, I don't believe I have.  
15 Q Have you ever worked for a company or  
16 business that had any connection or relationship to  
17 the tobacco industry?  
18 A No, I don't believe I have.  
19 Q Have you ever worked in any capacity in any  
20 way in the tobacco industry?  
21 A In the industry?  
22 Q Yes, in the industry.  
23 A No.  
24 Q Prior to being retained by the attorney  
25 generals in these type of state cases, had you even

03296  
1 ever studied and evaluated the tobacco industry as an  
2 economist prior to the time that you were retained in  
3 these attorney general lawsuits?  
4 A Well, the tobacco cases that I described when  
5 we have talked about the history of the industry,  
6 that's textbook antitrust material, and I've probably  
7 taught that material in classes before. So I've read  
8 about that, but aside from that, that's probably it.  
9 Q What I'm asking is, have you actually ever  
10 studied and evaluated the tobacco industry as an  
11 economist prior to your retention in this case?  
12 A I'm not sure I can answer the question any  
13 differently. I've studied it in order to be able to  
14 teach my students about the tobacco trust case and the  
15 1939 price fixing case. I have read about the tobacco  
16 industry, but I've not written research papers on the  
17 tobacco industry before this case, no.  
18 Q Do you recall giving a deposition in this  
19 case?  
20 A Two, actually.  
21 Q You actually were deposed at one time on  
22 August 31 and September 1 of this year, is that  
23 correct?  
24 A That's correct.  
25 Q And then you were deposed again on October

03297  
1 11?  
2 A That's correct.  
3 Q When you were deposed on the first day of  
4 your deposition on August 31, 1998, did you testify  
5 under oath at that time in that deposition that you  
6 had never studied the tobacco industry prior to being  
7 retained in these cases?  
8 A I can't recall if I said those words, but if

9 you would like to show them to me.  
10 Q You do remember testifying on August 31?  
11 A I remember testifying on August 31, that's  
12 right.  
13 Q And you were under oath at that time?  
14 A Yes, I was.  
15 MR. FERGUSON: Could I have the page number?  
16 MR. WEBB: Page 34, August 31 deposition.  
17 I'll read line 8 -- volume 11 -- through 13.  
18 Q Can you see that?  
19 A I can see that.  
20 MR. FERGUSON: I object to the use of the  
21 deposition, it seems to be consistent with the  
22 witness's testimony.  
23 MR. WEBB: I don't believe it is. He denied  
24 having ever studied the industry before having been  
25 retained.

03298

1 THE COURT: You may go ahead.  
2 BY MR. WEBB:  
3 Q Were you asked this question.  
4 Question: Prior to 1997 had you ever studied  
5 the tobacco industry?  
6 Was your answer: I don't think so, no,  
7 probably not?  
8 A That is certainly what I said. If I could  
9 complete that, and you went on to say, do you recall  
10 reading anything about the tobacco industry prior to  
11 that time, and I said, anything at all? You said,  
12 yes, or someone said yes. I said probably nothing  
13 stands out. And I think what I have in mind there is  
14 that I was familiar with the early history of the  
15 industry because of the cases that I described to you  
16 at that time.  
17 Q Actually --  
18 A Trying to be fair about what I had answered.  
19 Q Fine. Look at it, because you were asked the  
20 question -- we'll go through it all.  
21 The question was -- starting at line 11 --  
22 prior to 1997, had you ever studied the tobacco  
23 industry?  
24 Your answer: I don't think so, no, probably  
25 not.

03299

1 Question: Do you recall reading anything  
2 about the tobacco industry prior to that time?  
3 Your answer: Anything at all?  
4 Yes.  
5 Probably.  
6 Well then, next question: Nothing stands  
7 out?  
8 Nothing stands out.  
9 Then you went on to talk about something that  
10 happened in Minnesota?  
11 MR. FERGUSON: Object, ask that the witness  
12 be allowed to proceed through the rest of the portion  
13 that deals with this issue, put it in context.  
14 THE COURT: Is there some particular section  
15 that you are asking about?  
16 MR. FERGUSON: I think just the one that Mr.  
17 Webb was reading right there, in fairness read the  
18 rest of that.  
19 MR. WEBB: The rest of that answer.

20 Q And let's go back and make reference to the  
21 Minnesota bit again, which was prior to that as well,  
22 so I had read at least in terms of this type of  
23 litigation, I had read at least a complaint in that  
24 area.

25 Was that your answer?

03300

1 A That apparently was what I said.

2 Q What you were saying in that answer is that  
3 you had been contacted in connection with the  
4 Minnesota attorney general case, is that correct?

5 A That's correct.

6 Q And you had read the complaint in the  
7 Minnesota case?

8 A That's correct.

9 Q So prior to the time that you were actually  
10 retained to testify in these attorney general cases  
11 nothing actually stood out in your mind of anything  
12 you had even read or studied prior to the time you  
13 were retained, is that correct?

14 A I'm trying to give you an honest answer about  
15 what my position was. At that time I had not done  
16 research on the industry, however, I had certainly  
17 read things about the history of the industry, because  
18 the cases involved that I explained to the jury are  
19 well known cases and I probably taught them.

20 Q Prior to the time that you were retained to  
21 give opinions in this case, did you in any way  
22 consider yourself to be an expert on how tobacco  
23 companies design cigarettes?

24 A No.

25 Q Prior to being retained in this case, did you

03301

1 consider yourself to be an expert on how tobacco  
2 companies use research and development efforts to  
3 redesign cigarettes that respond to health concerns?

4 A No, I don't think I considered myself that.

5 Q Prior to being retained in this case, did you  
6 consider yourself to be an expert on the chemical  
7 constituents of cigarette smoke?

8 A No.

9 Q Prior to your retention in this case, did you  
10 consider yourself to be an expert on what constituent  
11 or constituents of cigarette smoke that the scientific  
12 and public health community believed to be harmful to  
13 smokers?

14 A No.

15 Q Prior to your retention in this case, did you  
16 consider yourself to be an expert on the mechanism by  
17 which cigarette smoke may cause disease in people who  
18 smoke?

19 A No.

20 Q Prior to your retention in this case, did you  
21 consider yourself to be an expert on how cigarette  
22 companies market and advertise cigarette products?

23 A No, not prior to my retention, no.

24 Q Prior to your retention in this case, did you  
25 consider yourself to be an expert on how our United

03302

1 States government regulates the advertising for  
2 cigarette products in the United States?

3 A No.

4 Q Prior to your retention in this case, did you

5 consider yourself to be an expert on the reasons why  
6 people decide to smoke cigarette products?  
7 A No.  
8 Q Prior to your retention in this case, did you  
9 consider yourself an expert on the reasons why members  
10 of the Washington State Medicaid population began to  
11 smoke cigarettes?  
12 A No.  
13 Q Prior to your retention in this case, did you  
14 consider yourself to be an expert on the reasons why  
15 people decide to quit smoking cigarettes?  
16 A No.  
17 Q Specifically, prior to your retention in this  
18 case, did you consider yourself to be an expert on the  
19 reasons why members of the Washington Medicaid  
20 population decide to quit smoking?  
21 A No.  
22 Q Prior to your retention in this case, did you  
23 consider yourself to be an expert on the cost  
24 structure of the Washington Medicaid program?  
25 A No.

03303

1 Q And prior to your retention in this case, did  
2 you consider yourself to be an expert on the types of  
3 health care costs incurred by people who are members  
4 of the Washington State Medicaid population?  
5 A No.  
6 Q So prior to your retention in this case, you  
7 did not consider yourself to be knowledgeable in any  
8 of the areas I just referred you to, is that correct?  
9 A I certainly didn't consider myself to be an  
10 expert in any of those areas, no.  
11 Q Let me ask questions about how you went about  
12 arriving at your opinions that you told this jury  
13 about after you were retained in this case.  
14 If I understand the testimony you gave on  
15 direct examination, you were retained for the first  
16 time in these attorney general lawsuits in connection  
17 with an attorney general lawsuit pending in the State  
18 of Arizona, is that correct?  
19 A That's correct. I believe I may have been on  
20 someone's list in this action as well, but I was not  
21 retained to be the primary antitrust expert in this  
22 case at that time, no.  
23 Q So you were retained in the Arizona case in  
24 December of 1997, last year, the end of last year, is  
25 that correct?

03304

1 A I think that's right.  
2 Q And you actually were retained in the Arizona  
3 case by the -- one of the same law firms that is  
4 handling this case here, is that correct?  
5 A That's correct.  
6 Q Is that Mr. Berman's law firm?  
7 A That's correct.  
8 Q And after you were retained in December of  
9 1987, am I correct you worked for about two or three  
10 weeks, spent about 15 to 20 hours evaluating the  
11 tobacco industry, and then you reached the opinion  
12 that you told this jury about in this case, is that  
13 correct?  
14 A I don't think I would characterize it quite  
15 that way, what I would say is I started to do some

16 work and reached some preliminary opinions, expecting  
17 to spend more time working on the case and refining my  
18 opinions, and deciding whether I agree with them,  
19 continue to agree with them or not. I try to keep an  
20 open mind as I read the documents, and I stated what  
21 my opinions were at that time, and if they had changed  
22 I would have changed them.

23 Q Tell the jury what happened, break it down.  
24 First of all, am I correct that once you were retained  
25 in the State of Arizona in December, that you worked

03305

1 for about two or three weeks, spent somewhere between  
2 15 and 20 hours, and then you prepared what is called  
3 an expert disclosure report, is that correct?

4 A That's correct.

5 Q And in that expert disclosure report that you  
6 prepared after working about 15 or 20 hours, you set  
7 forth your opinions that these four collusive  
8 agreements that you told the jury about, that you had  
9 arrived at the opinion that these four collusive  
10 arrangements actually existed, is that correct?

11 A I think I used slightly different terminology  
12 back in December, and that statement was a statement  
13 of my opinion at that time, that's correct.

14 Q And so it took you 15 to 20 hours of work to  
15 reach the opinions that these four collusive  
16 agreements existed?

17 A No, no, I would not say that at all. I have  
18 an opinion at different points in time. At that time,  
19 at that point in time that's what my opinion was. As  
20 I sit here today, I've done considerably more work. I  
21 haven't changed my opinions dramatically, I think I've  
22 said this before, that I've used slightly different  
23 language to describe them than I used in December, I  
24 think. I don't think my opinions have changed since  
25 then, but that was my opinion at that time, and my

03306

1 opinions are always subject to what I've seen at the  
2 time and what evidence I've had before me, what work  
3 I've done.

4 Q So the jury understands, am I correct that  
5 after 15 to 20 hours of work you prepared an expert  
6 report in which you stated that you had come to the  
7 conclusion that the tobacco companies had engaged in  
8 collusive efforts to -- and then first you said in  
9 your report to refrain from advertising that made  
10 claims based on or including supposed superior health  
11 benefits of particular brands of cigarettes?

12 MR. FERGUSON: Object, and suggest Mr. Webb  
13 show the document to the witness.

14 MR. WEBB: Happy to, Judge.

15 MR. FERGUSON: Thank you.

16 MR. WEBB: This is not in evidence, they  
17 objected, so this document is not in evidence. I'll  
18 show it to him to refresh his recollection, is that  
19 acceptable?

20 MR. FERGUSON: Yes.

21 MR. WEBB: Do you want a copy? I have an  
22 extra copy.

23 BY MR. WEBB:

24 Q I'll hand you a report to refresh your  
25 recollection, which I'll for the record state is

03307



1 marked as Defendant's Exhibit 1407, that's not in  
2 evidence.

3 So I'll hand this to you and ask you if that  
4 is your -- if that is the expert report that you  
5 prepared after doing about 15 or 20 hours of work in  
6 evaluating the tobacco industry?

7 A I would say it's my statement at that time,  
8 yes.

9 Q It says expert disclosure statement, see  
10 that?

11 A That's what it says, yes.

12 Q And do you see that over on the second page  
13 you list what you thought were the collusive  
14 agreements that you had concluded existed?

15 A That was my opinion at the time, it's correct  
16 it's my opinion today, but it's my opinion at the  
17 time, that's right.

18 Q Your opinion at the time you had reached the  
19 opinion and conclusion as to this arrangement that you  
20 put on this chart here that I'm marking right now,  
21 which is Washington Demonstrative Exhibit 5020, is  
22 that correct?

23 A I would say that I had reached that opinion  
24 at that time, that's right.

25 Q The opinion here -- the opinion that you put  
03308

1 as number two before this jury, you had reached that  
2 opinion after 15 or 20 hours of work, that's the  
3 opinion that there was an arrangement to mislead the  
4 public about smoking and health?

5 A That was my opinion at that time, and it  
6 continues to be my opinion today, yes.

7 Q Now, this opinion here, number three -- so  
8 the first two opinions, up to here you had reached  
9 after 15 to 20 hours of work?

10 A I was of that opinion at that time, and I'm  
11 of that opinion today, yes.

12 Q The third opinion here, the third arrangement  
13 that you described on this chart in front of the jury,  
14 5020, the arrangements to refrain from in-house  
15 testing of live animals, had you reached that opinion  
16 after 15 or 20 hours of work?

17 A That was my opinion at that time, and it's my  
18 opinion today, yes.

19 Q And the fourth agreement here that you listed  
20 on this chart, the arrangements to share breakthroughs  
21 on safer products, had you reached that opinion after  
22 15 to 20 hours of work?

23 A I'm not sure I listed that one at that point  
24 in time. No, I'm not sure I listed that one at that  
25 point in time. And I may not have had that opinion at  
03309

1 that time, at that point in time, that's my opinion  
2 now.

3 Q Now that I've showed you your document, does  
4 it appear to you that after 15 or 20 hours of work you  
5 had come to a conclusion about 3 out of 4 of the  
6 so-called collusive arrangements?

7 A I keep wanting to resist the use of your word  
8 conclusion. It's my opinion at that time, and it's my  
9 opinion now. I was of the opinion at that time on I  
10 think three of the four. I continue to hold that  
11 opinion.

12 Q Actually, looking at your report, if you look  
13 at your report, did you not determine in preparing  
14 this report that based on the document, looking at the  
15 bottom of page one -- are you at the bottom of page  
16 one?

17 A Yes.

18 Q -- that the documents reviewed by you  
19 demonstrate that the firms in this oligopoly had  
20 engaged in a concerted and collusive effort in the  
21 following respect, see that?

22 A Yes.

23 Q Does that sound like a final and conclusive  
24 opinion?

25 A No, it was my opinion at that time, it

03310

1 continues to be my opinion. And I in the last several  
2 months changed my mind about that. I would have told  
3 you or the various attorneys at the deposition  
4 where I stood at that point in time.

5 Q Let's find out what you actually did in the  
6 15 to 20 hours of work that you did to come to these  
7 conclusions.

8 One of the things that you did is, according  
9 to your report, is review industry documents, is that  
10 correct?

11 A That's correct.

12 Q Now, in fact your report says that it was  
13 those documents that demonstrate that the firms  
14 engaged in this collusive effort, see that?

15 A Yes, those documents.

16 Q See where it says that?

17 A Yes.

18 Q I'd like to find out how those documents were  
19 selected for you to look at.

20 A Those documents were selected by -- they were  
21 sent to me by attorneys.

22 Q They were sent to you by Mr. Berman's law  
23 firm, is that correct?

24 A That's correct.

25 Q Mr. Berman's law firm selected the documents

03311

1 that you reviewed, is that correct?

2 A That set of documents, yes.

3 Q That's the set of documents you reviewed to  
4 come to those conclusions, is that correct?

5 A That's a part of the set. Documents, those  
6 documents and reading in textbooks about the structure  
7 of the tobacco industry and applying my economic  
8 training is what led me to reach those opinions at  
9 that point in time, that is correct.

10 Q I'll get to the others. I'm sticking with  
11 documents for the moment.

12 The only documents from the tobacco industry  
13 that were given to you to look at to reach your  
14 opinions about these collusive agreements, those  
15 industry documents were selected by Mr. Berman's law  
16 firm, is that correct?

17 A At that point in time, that's correct.

18 Q At that point in time means that that's up to  
19 the point that you reached your opinions, the opinions  
20 that you set forth?

21 MR. FERGUSON: Objection, repetitive.

22 THE COURT: Overruled.

23 BY MR. WEBB:

24 Q The opinions that you just told the jury,  
25 one, two and three, those opinions, you reached those  
03312

1 opinions based on documents selected by Mr. Berman's  
2 law firm as set forth in your report, is that correct?

3 A I'm not sure I would characterize that as  
4 correct, no. I think what I would say is I reached  
5 those opinions at that time based in part on those  
6 documents and in part on other things.

7 Q Actually, what your report says is that you  
8 reached that conclusion based on those documents.

9 See that, sir?

10 A Yes.

11 Q I'll read that. The documents reviewed by  
12 Dr. Solow demonstrate that the firms in this oligopoly  
13 engaged in a collusive, concerted effort in the  
14 following respects. Then you list responses we have  
15 just been through, is that right?

16 MR. FERGUSON: Objection. For context, I ask  
17 the witness look at the last paragraph of the  
18 document, read the last paragraph.

19 THE COURT: Any objection to that?

20 MR. WEBB: No objection. In fact, I'll go to  
21 it right now.

22 BY MR. WEBB:

23 Q Read the last paragraph of the document.

24 A Read the last paragraph on page two?

25 MR. WEBB: Which one do you want him to read?  
03313

1 MR. FERGUSON: Last paragraph on page two.

2 THE WITNESS: It says, Dr. Solow will base  
3 his opinions on his education, experience, training,  
4 skill and research in the fields of industrial  
5 organization economics, that's one phrase, industrial  
6 organization economics, antitrust economics and  
7 competition policy, as well as on the examination of  
8 documents provided to Dr. Solow by counsel for the  
9 plaintiff.

10 Dr. Solow may also comment on the opinions  
11 offered by other defendants -- I should stop reading  
12 so quickly -- offered by defendant's expert.

13 BY MR. WEBB:

14 Q With that paragraph Mr. Ferguson asked you to  
15 read off, is that you reached these conclusions based  
16 on, it says, documents provided by counsel for the  
17 plaintiff.

18 See that that you just read?

19 A Yes.

20 Q Is that a truthful statement?

21 A Those documents were certainly part of what I  
22 took to reach my opinions at that time, and as I sit  
23 here today.

24 Q As an expert witness, trying to be fair and  
25 objective, did it concern you at that time that you  
03314

1 were reaching opinions based solely on documents  
2 selected by the lawyers for the State? Did that  
3 concern you?

4 A I don't believe I reached opinions based  
5 solely on documents selected by the State. I reached  
6 opinions based on economic analysis based on my  
7 evaluation of the industries from reading texts and my

8 understanding of how markets work and also on  
9 documents that had been selected by the State at that  
10 point in time. That didn't bother me particularly at  
11 that point in time, because I knew that I would have  
12 time to continue to develop my opinions, and I would  
13 have an opportunity to ask about other documents, and  
14 if my opinions changed, I would let people know what  
15 my opinions were as they developed.

16 Q The fact that the only documents -- I'll go  
17 back. The only actual industry documents you actually  
18 had in your possession were selected by the State?

19 A That is correct.

20 Q Now, the fact that you did not -- and you  
21 were aware at that time that the State, the lawyers  
22 for the State properly saw -- are advocates for the  
23 State, you understand that?

24 A Yes.

25 Q And you understand that your duty as an

03315

1 expert is to try to be fair and objective in rendering  
2 opinions? You understand that, do you not?

3 A Yes.

4 Q At the time, did the thought enter your mind  
5 that maybe the State was providing you documents that  
6 only gave you one view of the case? Did that thought  
7 enter your mind?

8 A That would strike me as a very dangerous  
9 thing for the State to do. I think the worst thing  
10 the State would want to do is hide from me things that  
11 would matter, because then I would not look like a  
12 very good witness. I would not be well informed, I  
13 think the State would want me to know what was going  
14 on, truthfully, and have me make my own decisions  
15 about that.

16 Q That thought didn't enter your mind?

17 A The thought has entered my mind, but I think  
18 it's likely to be a bad strategy for the State.

19 Q So the thought entered your mind that you  
20 might be getting slanted documents or slanted  
21 portrayal of the case, but you disregarded that. What  
22 you are saying is no, I think a fair way to put it is  
23 that I recognized that the State was likely to be  
24 sending me the documents that they thought made  
25 the strongest case, its strongest case, but it would

03316

1 not want to hide from me things that it knew pulled in  
2 the other direction, because then I would end up being  
3 misinformed.

4 They want me to offer an honest and objective  
5 opinion.

6 You did assume that the State would send you  
7 documents that at least supported the strongest view  
8 of their case?

9 A Yes, and I wanted to look at, for example,  
10 the reason why I then went and looked at the structure  
11 of the industry was to ask myself is this plausible to  
12 the State. As I understand these documents, they  
13 certainly suggest, I think the jury has seen some now  
14 they certainly suggest there were agreements, no two  
15 ways about that?

16 Q We'll go into that.

17 A I went to look at the structure of the  
18 industry to see whether I thought that was plausible.

19 If this has been a very competitively structured  
20 industry, I would have said something is wrong, this  
21 can't be right.

22 Q As I understand it, you at least were aware  
23 at that time that at the time the State selected  
24 documents and sent them to you and you reached your  
25 opinions that are in that report, you were aware at  
03317

1 that time that there were several million industry  
2 documents that had been produced and provided to the  
3 State in a depository, is that correct?

4 A I'm not sure I was aware of if at that time,  
5 quite the volume of paper that had been generated in  
6 this case or cases like it.

7 Q You eventually became aware of that?

8 A Yes.

9 Q Have you ever gone to the repository to look  
10 at those documents?

11 A I don't know if I went to the depository, no.

12 Q You would remember if you went there?

13 A I know I've been to a room in a law firm that  
14 has vast, vast quantities of paper. I'm not sure if  
15 that is the repository, I'm not sure where the  
16 repository is, no.

17 Q I'd like to start by -- before I go through  
18 -- we'll go through each the agreements you listed on  
19 this chart here, before I do that let me for a few  
20 minutes talk about a subject matter that appears to  
21 have taken up quite a bit of your testimony, that is  
22 the subject matter of safer cigarettes.

23 Remember that subject matter?

24 A Yes.

25 Q I think you actually prepared a chart, Mr.

03318  
1 Ferguson and you prepared a chart called safer  
2 cigarettes.

3 See that?

4 A Yes, safer in quotes.

5 Q Let's talk about safer cigarettes.

6 I take it from the testimony that you've  
7 given the jury that you believe that it has been  
8 established that technologically, it's technologically  
9 feasible for cigarette companies to actually  
10 manufacture safer or less hazardous cigarettes, is  
11 that correct?

12 A I'm not sure I would put it quite that way, I  
13 think it's my opinion that the cigarette companies  
14 believe that they had products, that they could  
15 produce products that were safer.

16 Q My question is are you assuming that it is  
17 technologically feasible for cigarette companies to  
18 actually manufacture a safer or less hazardous  
19 cigarette?

20 A I believe that the cigarette companies are  
21 capable of producing cigarettes that they believe are  
22 safer.

23 Q But would you -- do you mind answering my  
24 question?

25 A I am not sure what the distinction is, I'm

03319  
1 trying to tell you what I do believe.

2 Q I'll try one more time. My question is are  
3 you assuming in giving your testimony about safer

4 cigarettes, are you making the assumption that it was  
5 technologically feasible for cigarette companies to  
6 actually manufacture safer or less hazardous  
7 cigarettes?

8 A I'm not sure I'm assuming that. I think the  
9 documents reveal that the industry believed that and  
10 that's -- I'm not sure I see the distinction.

11 Q Set aside -- we're not talking about what the  
12 tobacco companies believe, are you with me? Set that  
13 aside.

14 A Okay.

15 Q Set aside what you would interpret their  
16 belief to be. Are you with me?

17 A I think so.

18 Q Based on the evidence that you have seen,  
19 have you come to the conclusion that it is  
20 technologically feasible for cigarette companies to  
21 actually manufacture a safer or less hazardous  
22 cigarette?

23 MR. FERGUSON: Objection, asked and answered.

24 THE COURT: Overruled.

25 THE WITNESS: I'm not sure I'm in a position

03320

1 to evaluate whether a cigarette is actually safer or  
2 not. I think that Dr. Henningfield and Dr. Burns are  
3 the people who could tell the jury whether a cigarette  
4 really is safer or not. I'm not a medical doctor so  
5 I can't tell you whether. That's why I put safer in  
6 quotes, I'm not sure I'm the person who has expertise  
7 to tell you whether it's actually safer or not.

8 BY MR. WEBB:

9 Q You told the jury that there would be safer  
10 products in the market sooner, that people in the  
11 State of Washington in the Medicaid population would  
12 make smoking choices and switch to that safer product  
13 then this state would have suffered less injury by  
14 paying less health care costs, is that correct?

15 A That's correct.

16 Q So you're clearly assuming in the bottom line  
17 of your testimony that this state has been injured,  
18 you are making an assumption that an actual safer  
19 cigarette product would have been in the market at  
20 some point in time, is that correct?

21 A I'm relying on developments in the industry,  
22 for example, the documents in the Liggett XA case or  
23 the documents regarding Premier where the company  
24 -- I'm taking the company's word for this.

25 Q Talk a little bit -- in order for the tobacco

03321

1 companies -- it's one thing -- do you agree it's one  
2 thing for the tobacco companies to believe that they  
3 have developed a cigarette that may be less hazardous  
4 or safer and it's another to say that they would have  
5 the right to go out and advertise it and market it to  
6 the American public as a safer or less hazardous  
7 cigarette, those are two different things, is that  
8 correct, doctor?

9 A I think those are two different things.

10 Q Do you agree that what you called this first  
11 collusive arrangement that you called it, the  
12 arrangement not to advertise on the basis of health  
13 claims, do you agree that in order for tobacco  
14 companies to manufacture a product and then advertise

15 it as safer or less hazardous, it is going to have to  
16 have been -- have to be scientifically established  
17 that the product is actually less hazardous before  
18 we're going to let somebody advertise it as less  
19 hazardous, is that correct?

20 A I believe that the industry has to  
21 substantiate its claims. If it's going to advertise  
22 on the basis of health, those have to be true claims  
23 and have to have evidence to support that that's  
24 correct.

25 Q Therefore, if we're going to advertise a  
03322

1 cigarette as being less hazardous we better be certain  
2 that there is a good scientific basis to conclude it's  
3 less hazardous before we tell the American public in  
4 an advertisement that it's less hazardous.

5 Do you agree with that?

6 A I would agree that whatever you say you have  
7 to be able to back up.

8 Q If we say it's less hazardous, we better be  
9 able to prove it's less hazardous, is that correct?

10 A I think that follows.

11 Q In order to determine if the tobacco  
12 companies go out and invent or develop a new cigarette  
13 product, new design that they believe may be safer,  
14 may be healthier, do you agree that they still can't  
15 advertise that product and tell the scientific  
16 community has determined that in fact it is less  
17 hazardous?

18 A No, I don't think that necessarily follows.  
19 I think they have to have the evidence, whatever  
20 evidence it takes to convince the Federal Trade  
21 Commission that they can make the claim they want to  
22 make, whether the scientific community agrees with  
23 that or not is another matter. The Federal Trade  
24 Commission is responsible for seeing to it that  
25 advertising is not deceptive.

03323

1 Q The tobacco companies have to go to the  
2 Federal Trade Commission with scientific evidence and  
3 support that would prove that the product is less  
4 hazardous before it could be advertised as less  
5 hazardous, is that correct?

6 A They would have to have the evidence to  
7 support the claims. Proof is a pretty strong term but  
8 they would have to satisfy the Federal Trade  
9 Commission that the claims they were making were in  
10 fact truthful claims.

11 Q Based on scientific evidence is that fair to  
12 say?

13 A Based on whatever sorts of tests the Federal  
14 Trade Commission would require.

15 Q Actually there is only one, isn't there?

16 A I'm not sure of that.

17 Q Well, am I correct based on all work you have  
18 done in trying to prepare for this case, have you  
19 become aware that if the tobacco companies redesigned  
20 or design a cigarette product that they think might be  
21 less hazardous, safer to smoke, that in the scientific  
22 world the only way that you can develop scientific  
23 evidence to prove that in fact it's safer for people  
24 who smoke it is you have to do what are called  
25 epidemiology studies, is that correct?

03324

1 A I'm not certain if that is the position of  
2 FTC, for example, I'm not sure that's true.

3 Q In fact the truth is that is the only way  
4 anyone can find out, isn't it?

5 A I'm an economist. The right person to ask  
6 about that is a doctor, somebody like Dr. Henningfield  
7 or Dr. Burns. The Liggett & Myers people apparently  
8 were prepared to go to the FTC with the mouse skin  
9 painting test so they can say this product doesn't  
10 cause cancer on the backs of mice, that's the test  
11 they were going to use and it was apparently the claim  
12 they considered making if they had that data. If they  
13 had that data, that would have been a truthful claim.

14 Q I'm asking you have you come across any  
15 information in preparing for your testimony that the  
16 only way that it can ever be established  
17 scientifically that a new product in fact is safer is  
18 to have people smoke the product for many years,  
19 follow them with statistics called epidemiology and  
20 find out once and for all whether in fact it's safer  
21 or not safer.

22 My question, isn't that the only way that we  
23 ever find out whether a cigarette product is safer or  
24 less hazardous?

25 A I don't know, I think you would have to ask a

03325

1 medical type person.

2 Q Look at some of the evidence in the case,  
3 maybe you have seen some of this evidence.

4 A Maybe I have.

5 Q Before I show you this, let's talk about  
6 common sense.

7 Economists have common sense, is that fair to  
8 say?

9 A I like to think I have common sense.

10 Q I'll suggest you do.

11 It's one thing to develop a product, take  
12 some tar from a new cigarette product, paint it on the  
13 back of a mouse and see that it doesn't cause as many  
14 tumors as other cigarettes?

15 A Or any tumors.

16 Q Right, but we wouldn't -- you would agree we  
17 would not take that evidence, that evidence and  
18 extrapolate it to human beings and just conclude that  
19 that cigarette will be safe or safer in human beings,  
20 would we?

21 A I don't know, I don't do that kind of  
22 research. As a matter of the common sense, when Dr.  
23 Wynder painted the condensed smoke of ordinary  
24 cigarettes on the backs of mice and cancer developed,  
25 I think -- I am speaking from common sense, not as an

03326

1 expert in the medical area -- that people common  
2 sensically took that as an implication that maybe  
3 there really was a link between smoking and cancer in  
4 people, but you asked me for a common sense opinion,  
5 I'm not an expert in this area.

6 Q Once common sense opinion you do agree, we  
7 probably don't want the cigarette companies out there  
8 advertising products as safe, safer, less hazardous,  
9 healthy until we actually know if they are in fact  
10 that.



11 Is that fair to say from a common sense  
12 standpoint?

13 A From a common sense standpoint we don't want  
14 to have tobacco companies or anyone else making claims  
15 that aren't true to consumers.

16 Q And as far as if the cigarette companies  
17 design a new product -- well, strike the question.

18 I'll show you a document that is in evidence  
19 this is the FTC monograph, Exhibit AS811. This in  
20 evidence, the jury has seen this before but I want to  
21 focus on one part of it.

22 This is a -- you were here during actually  
23 part of Dr. Henningfield's testimony, am I correct?

24 A I was here for part of his cross-examination  
25 and the redirect. I was not here for his direct

03327

1 examination, no.

2 Q What I've shown you is -- I've put on the  
3 screen -- first of all, I'll establish whether you  
4 have seen this before, this is the FTC monograph which  
5 has a group of articles in it.

6 Have you seen this?

7 A I haven't read through it, I saw it. The  
8 name Samet is familiar to me so I think I was probably  
9 in the room when Dr. Henningfield discussed it.

10 Q You did not review this document in coming to  
11 any of your conclusions as to whether the cigarette  
12 companies should have been able to advertise safer  
13 products, you did not rely on this document?

14 A No, I don't think I've seen this document  
15 before.

16 MR. LUVERA: Am I correct, page 77?

17 MR. WEBB: Correct, page 77. Apologize for  
18 not telling you that.

19 Q I'm at page 77, chapter six, called The Change  
20 in Cigarette and Disease Risk, Current Status of  
21 Evidence, and I'll represent to you the evidence  
22 establishes in this case -- this was prepared in 1994  
23 and I believe published in 1996 so it's reasonable  
24 current.

25 A Take your word for it.

03328

1 Q That's what the evidence shows.

2 Now, the evidence also has established, at  
3 least Dr. Henningfield testified that Dr. Samet is a  
4 very prominent and well-known epidemiologist?

5 A I'll take your word for it. I don't know Dr.  
6 Samet, I'm not in a position to evaluate his  
7 credentials.

8 Q You have learned in working on this case what  
9 epidemiology studies are?

10 A I have a working person's knowledge of what  
11 an epidemiological study would be.

12 Q Let's go through it and make sure we have the  
13 same knowledge.

14 Generally, epidemiology studies, do you  
15 understand them to be long-term studies where  
16 scientists basically track information about a  
17 population of people and try to statistically measure,  
18 among other things, things that affect health such as  
19 smoking, diet, exercise, taking vitamins, and they try  
20 to track these large groups of people and develop  
21 statistics that will answer questions as to whether or

22 not certain lifestyle habits are either healthier, not  
23 healthy, et cetera, is that correct?

24 A That's my understanding of it, yes.

25 Q And you do understand conceptually, before we  
03329

1 go through this document, do you not, from a common  
2 sense standpoint that if you change a cigarette  
3 product and design it in a certain way and you believe  
4 it might be safer, that one way to find out if it's  
5 safer is to keep track of who smokes it, look at the  
6 statistics as to whether they get sick, die too soon,  
7 develop a smoking related disease and develop  
8 statistics about it.

9 Do you understand that?

10 A I understand that would be one way to study  
11 the question.

12 Q And what you will see here, Dr. Samet, at the  
13 bottom of this page, this is page one of his  
14 discussion of the changing cigarette disease risk, he  
15 says here down at the bottom of the page here only  
16 epidemiologic studies can provide information.

17 He says only?

18 A That's what he says, yes.

19 Q Only epidemiologic studies can provide  
20 information on modification of the risk of smoking as  
21 the cigarette has evolved. Let's stop there.

22 You're aware that by -- we get up to 1994  
23 that the design of cigarettes had changed  
24 significantly from the time of the early 1950s, have  
25 you learned that during your studies?

03330

1 A I think cigarettes are different today than  
2 in the 1950s.

3 Q Dr. Samet is saying that if -- so the  
4 modification he is trying to find out, providing  
5 information on the modification, on the risk of  
6 smoking as the cigarette has evolved only  
7 epidemiologic data -- by the way, that word,  
8 epidemiologic data, I think in layman's terms does  
9 that mean statistics to you?

10 A If you want.

11 Q I'm asking you.

12 A I have studied statistics as part of  
13 economics training. I think of data as the numbers,  
14 and statistics as the techniques that one applies to  
15 try to infer things from the data. I don't want to  
16 quibble talking about statistical study of  
17 epidemiologic data, I can live with that.

18 Q He says and only epidemiologic data can  
19 measure the risk of cigarettes under the natural  
20 circumstance of use.

21 See what he says?

22 A Certainly says those -- I see those words.

23 Q When he says the natural circumstance of use,  
24 he is talking about people who smoke the new cigarette  
25 product, modified product?

03331

1 A And how they smoke them, yes.

2 Q In other words, we could sit around in a  
3 laboratory and speculate about whether a product is  
4 safer, we could put tar on the back of mice and talk  
5 about it but it's only after people smoke the product  
6 the way they are going to smoke it are we ever going

7 to find out if it's safe, at least that's what he is  
8 saying?

9 A That's what he seems to be saying.

10 Q By the way, you don't suggest you are more  
11 knowledgeable than Dr. Samet, do you?

12 A Not in this area.

13 Q He goes on to say, however, the dynamic  
14 nature of the exposure -- I don't know why I can't  
15 read that, sometimes it's the angle. Figure one, I'm  
16 sorry.

17 The dynamic nature of the exposure challenges  
18 the epidemiologic researcher to classify accurately  
19 the pattern of cigarette use. When changes are made,  
20 that may not be indexed by tar and nicotine yields  
21 measured with a smoking machine.

22 See that?

23 A I see those words, yes.

24 Q In this article he goes on to describe some  
25 epidemiologic studies that had been done on low tar

03332

1 and nicotine cigarettes, I'll represent that to you  
2 because you said you have not read this document.

3 A I've not read this study. Seems like more of  
4 a doctor's document than I would be in a position to  
5 -- I don't read epidemiologic studies in my daily  
6 work, it's not my area. I have not read this one.

7 Q Although you have come into this courtroom  
8 and offered opinions on matters that you are not  
9 knowledgeable about or expert on before you were  
10 retained in this case?

11 A No, I would disagree with that  
12 characterization.

13 Q I asked you earlier if you were an expert on  
14 cigarette design before you were retained in this  
15 case.

16 A Yes.

17 Q You said you were not.

18 A I'm not an expert on cigarette design, no.

19 Q Nor were you an expert on what modifications  
20 to a cigarette may be used to make it safer or  
21 healthier?

22 A I have some understanding from the work that  
23 I've done on this case but I'm not an expert on  
24 modifying or changing the design of cigarettes.

25 Q You certainly weren't before you were

03333

1 retained?

2 A No.

3 Q And so Dr. Samet goes on, says evidence in  
4 epidemiologic studies has well-known strengths and  
5 limitations, cited Rothman, 1986, epidemiologic research  
6 has a central role in characterizing the consequence  
7 of the changing cigarette because it supplies direct  
8 information on the consequences of varying tar and  
9 nicotine yield products. Thus, the finding inherently  
10 consider compensatory changes in inhalation patterns  
11 or in the numbers of cigarettes smoked. Stop there a  
12 minute.

13 You understand what he is saying there?

14 A I believe I have an understanding of what he  
15 is talking about there.

16 Q What he is saying is that this is  
17 epidemiologic research that will give us direct

18 information on the consequences of when we change the  
19 design of a cigarette such as the tar and nicotine  
20 yields, is that correct?

21 That's what he is saying?

22 A It says epidemiologic research has had a  
23 central role in characterizing the consequences of the  
24 changing cigarette because it supplies direct  
25 information on the consequences of varying tar and

03334

1 nicotine product yields -- sorry, yield product.

2 Does say that, yes.

3 Q He goes on, and provide the evidence needed  
4 to answer the question of immediate public health  
5 relevant whether disease risk varies with cigarette  
6 tar and nicotine yields as demonstrated by the FTC  
7 method.

8 A As determined by the FTC.

9 Q As determined by the FTC method.

10 See that?

11 A Yes.

12 Q He goes on to discuss this epidemiologic  
13 studies -- I won't go through this, just to educate  
14 you on the first one, he is talking about what is  
15 called the ACS -- that's called the American Cancer  
16 Society, you know what that is?

17 A Yes.

18 Q Cancer prevention study provided early  
19 evidence on the risk of lower tar and nicotine  
20 cigarette, Hammond, CPS1, included about one million  
21 volunteers who were followed from 1960 to 1972.

22 See that?

23 A Yes.

24 Q And I'll not walk through all the studies,  
25 the jury has been through these before but here is my

03335

1 question to you.

2 You understand what Dr. Samet is saying here  
3 is that if the cigarette companies are going to go out  
4 and change their product and redesign it to lower tar  
5 and nicotine or do something else that might make them  
6 safer, that unless we do one of these epidemiologic  
7 studies we'll never know whether it truly is good or  
8 bad for people, at least that's what he is saying  
9 here.

10 Understand that?

11 A Seems to be what he is saying there.

12 Q Thank you.

13 THE COURT: Let's take the morning recess.

14 (At this time a short break was taken.)

15 THE COURT: Please sit down.

16 BY MR. WEBB:

17 Q Doctor, I want to stick with the subject  
18 matter that we were talking about before the recess,  
19 which is the -- Doctor, as I was saying --

20 Can you hear me all right?

21 A I can hear you, yes.

22 Q Sticking with this issue -- actually safer  
23 cigarettes and your -- this issue about whether the  
24 cigarette companies should be advertising cigarette  
25 products as safer or healthier or less hazardous, that

03336

1 subject matter, sticking with that for a moment, I  
2 think when we left off when I was showing you the

3 report of Dr. Samet, where he is talking about that  
4 only epidemiology studies will tell us if actual human  
5 use of cigarettes, in fact, the way they are naturally  
6 used, can determine if they are creating less risk  
7 with them.

8 You are not suggesting to this jury that you  
9 know more than Dr. Samet about the type of scientific  
10 evidence that we should have before we reach any  
11 conclusion about whether certain cigarette products  
12 are safer or healthier or lower the risk of certain  
13 disease, are you?

14 A No, I'm not -- I don't want the jury to think  
15 that I am a doctor and understand how that type of  
16 study is done.

17 Q And you are not a research scientist,  
18 obviously?

19 A Not a medical research scientist.

20 Q It is clear, it is clear based on what Dr.  
21 Samet said in his report, it would be clear to you  
22 using common sense, it would be very risky for a  
23 company to go out and advertise a product as safer or  
24 healthier if they had not done -- if someone had not  
25 done one of these epidemiology studies that in fact

03337

1 would tell us once and for all whether or not it is  
2 safer or healthier?

3 A I'm not sure whether I would -- whether I  
4 would say that at all. My position is, my opinion is  
5 that whatever the company says, it has to have  
6 evidence to support it. Whatever claim it chooses to  
7 make, it ought to have the -- it needs to have, from  
8 the FTC standpoint, evidence to support that.

9 Q I know that. We are trying to now find out  
10 what evidence that would be. My question to you is,  
11 if we now got a look at what kind of evidence  
12 rationally exists out there in the scientific world  
13 that we can find before we are going to let a  
14 cigarette company advertise something that is safer or  
15 healthier, my question to you was, based on what you  
16 just saw from Dr. Samet, you at least would agree that  
17 it would be risky if we let a cigarette company  
18 advertise a product as safer or healthier if we didn't  
19 have that type of epidemiology to tell us once and for  
20 all if it was, is that fair to say?

21 A No, I think what I would say is I am not in a  
22 position to evaluate whether Dr. Samet is right or  
23 whether other people in the health community are right  
24 about what sort of evidence one ought to meet. And I  
25 think those questions are better directed to somebody

03338

1 like Dr. Henningfield or Dr. Burns, who are scientists  
2 and doctors and do understand what sort of medical  
3 evidence one ought to have in order to make a claim  
4 like that.

5 My only position is that whatever claim one  
6 chooses to make in the process of advertising a  
7 product, one ought to -- according to the FTC, one  
8 needs to be able to substantiate that.

9 Q No, but, Doctor, you told this jury -- you  
10 have come in here as an expert and told the jury that  
11 the tobacco companies had some kind of arrangement not  
12 to compete on the basis of health, and you told the  
13 jury that part of the evidence that you relied upon to

14 reach that conclusion was the conduct of the tobacco  
15 companies and the way they advertised their products  
16 over the past thirty years or so?

17 A That's correct.

18 Q And so all I am asking you, does an economist  
19 -- I know as an economist you are using economic  
20 theories. I will strike the question.

21 When economists develop their economic  
22 theories, do they consider the safety and health of  
23 people as they develop their theories?

24 A If safety and health is an important part of  
25 the thing to be explained, that would certainly enter

03339

1 into it.

2 Q Do you agree here advertising cigarette  
3 products as safe or safer or less hazardous, that  
4 involves people's health, do you agree with that?

5 A Yes.

6 Q In fact, Doctor, you have learned enough,  
7 based on the research you have done, to give your  
8 economic opinions that even if you had done an  
9 epidemiology study on a certain cigarette product,  
10 even with that, it could be risky to start claiming a  
11 cigarette is safer, because the epidemiologist may  
12 change their mind as more years go by. Is that fair  
13 to say? Have you seen evidence of that?

14 A I guess I haven't seen evidence of that. It  
15 seems to make sense, but I haven't seen evidence of  
16 that.

17 Q You may not recognize it, but let me ask you  
18 about it.

19 First of all, let's take -- the one cigarette  
20 -- strike the question.

21 Do you agree, based on the documents you have  
22 seen and the evidence you have reviewed, that the one  
23 major change -- that one major change that has  
24 occurred in cigarette products between the 1950s and  
25 today is an overall reduction in tar and nicotine

03340

1 levels in cigarettes?

2 A I understand that to be a somewhat confusing  
3 topic. Do you mean as measured by the FTC's smoking  
4 machine, or as measured by the way people actually  
5 smoke them?

6 Q Let's take the FTC smoking machine.

7 A My understanding is, as measured by the FTC  
8 smoking machine there has been reductions in the level  
9 of tar and nicotine in cigarettes.

10 Q And when the tobacco companies began to do  
11 that, reducing tar and nicotine levels, there were  
12 epidemiology studies that said this is working, it is  
13 actually lowering the risk of lung cancer in people,  
14 is that correct?

15 A I don't know. I don't follow the  
16 epidemiological literature. I'm sure Dr. Henningfield  
17 and Dr. Burns are in a much better position to tell  
18 the jury what the medical community results were.

19 Q I take it you -- did you review the surgeon  
20 general reports to prepare for your testimony, sir?

21 A I haven't looked at all of them, certainly.  
22 I may have looked at some of them.

23 Q Did you look at some of the major ones?

24 A If I looked at any, it would have been the

25 major ones, say 1964. I don't think I have read a lot  
03341

1 on the surgeon general's reports.

2 Q Actually it was the 1981 surgeon general's  
3 report that actually looked at the issue of the  
4 changing cigarette and the health consequences. Did  
5 you read that report over?

6 A I don't believe so, no.

7 Q This document is in evidence as State Exhibit  
8 3672. It is the 1981 surgeon general report. I am  
9 going to show you just a page of it.

10 The point I am going to make to you, this is  
11 now 1981, and so low tar and nicotine cigarettes have  
12 been manufactured for twenty some years by this point.  
13 I don't -- have you seen evidence that they began to  
14 manufacture low tar and nicotine cigarettes in the mid  
15 1950s?

16 A I have seen evidence that -- I'm not -- I  
17 don't know entirely what to make of it, because of a  
18 lack of standard of measurement. I know that the  
19 standard of measurement was an important question,  
20 until the '70s -- as I understand it, it was not clear  
21 there was a common way to measure. But I understand  
22 that lower tar and nicotine cigarettes -- that  
23 cigarettes were being advertised as lower in tar and  
24 nicotine in the 1950s, yes.

25 Q And here you can see in 1981 the surgeon

03342  
1 general said, today's filter tipped, lower tar and  
2 nicotine cigarettes produce lower rates of lung cancer  
3 than do their higher tar and nicotine predecessors.

4 Do you see that?

5 A I see those words, yes.

6 Q Actually, I can show you another one even  
7 sooner than that.

8 This is a quote from the Public Health  
9 Service. This is still the 1981 surgeon general  
10 report, but it is a different quotation that actually  
11 goes back to the Public Health Service.

12 MR. FERGUSON: What is the page number?

13 MR. WEBB: 200 of the 1981 surgeon general's  
14 report.

15 BY MR. WEBB:

16 Q What this reflects, back in 1966 the Public  
17 Health Service submitted to Congress the technical  
18 report on tar and nicotine on the basis of the clear  
19 demonstration of cigarette dose dependent risk of  
20 several diseases, the PHS concluded the preponderance  
21 of scientific evidence strongly suggests that the  
22 lower the tar and nicotine content of cigarette smoke,  
23 the less harmful would be the effect. We recommend  
24 the progressive reduction of the tar and nicotine  
25 content of cigarette smoke.

03343

1 That is in 1966. Do you see that?

2 A I see that.

3 Q But -- but did you hear the testimony in this  
4 courtroom in the last two weeks when Dr. Henningfield  
5 and Dr. Burns told this jury that in their opinions,  
6 as members of the public health community, that today  
7 they believe that these lower tar cigarettes are not  
8 healthier and are not safer?

9 A I didn't hear Dr. Burns. I understand that

10 they said that. I will take your word for it that  
11 they actually said that, and I understand that is  
12 their position.

13 Q Do you understand the risk that a cigarette  
14 company would be taking to be advertising cigarette  
15 products as safe or safer, even on the basis of  
16 epidemiology, when they may change their mind later  
17 on?

18 A My understanding is that whatever claims one  
19 wants to make, one has to have evidence to back that  
20 up. If evidence changes and new knowledge comes out,  
21 at least at the time the claim was made, there was  
22 substantiating evidence, and I would presume that the  
23 Federal Trade Commission would have viewed that as a  
24 truthful claim.

25 Q What about all the people that were misled

03344

1 all these years, smoking these cigarettes thinking  
2 they were safer, when they changed their mind and said  
3 they are not safer? Is that a good thing for society,  
4 to advertise that?

5 A I think -- what I would say is that as  
6 scientists learn new things, and that truthful  
7 information comes out, people have to adjust their  
8 behavior. We have learned over time that a variety of  
9 things people used to do, used to do a lot more of are  
10 maybe now not so good for us, and people change their  
11 behavior.

12 I don't think of that as misleading, I think  
13 of that as scientists doing the best job they can with  
14 the evidence they have to date. I think misleading is  
15 knowing things and not providing that evidence to the  
16 public or not providing that evidence to the  
17 scientific community, the way the cigarette industry  
18 knew that tobacco was addictive but didn't tell the  
19 doctors and fought the doctors on that question.

20 Q Let me just see if you can answer this  
21 question. Do you think it is better from society's  
22 standpoint to have tobacco companies out there, as you  
23 say as an economist, competing by making health claims  
24 when in fact it turns out that the health claim that  
25 they are competing over is wrong and the people

03345

1 smoking the cigarettes are hurt by it? What is better  
2 for society?

3 A Hindsight is always 20/20. If you know  
4 looking back that you were wrong, you wish you hadn't  
5 done that. But I think what is best for society is  
6 that the best information that is available at the  
7 time be made available to people and they can make  
8 their best informed judgment at that time.

9 To look back after twenty years and say,  
10 oops, we were wrong about that and therefore we were  
11 misleading people is not quite the way I would  
12 characterize it. That's what they thought at the  
13 time. Now, perhaps we think something different.

14 Q Do you agree, Doctor, that whether a  
15 cigarette product is in fact safer or healthier and  
16 should be advertised as such, that can be a very  
17 complicated subject?

18 A Apparently it can, yes.

19 Q And do you fault the tobacco companies if  
20 they had been cautious over the years in avoiding



21 claiming that cigarette products were safer and  
22 healthier when they don't have the epidemiology  
23 studies to prove it? Do you fault them for doing  
24 that?

25 A I fault them for having -- I fault them for  
03346

1 not making claims that they could -- that they could  
2 back up, for not telling consumers that they had  
3 products that their own documents indicate that they  
4 felt were safer or less biologically active or  
5 physiologically superior. And I fault them because it  
6 would have been to their competitive advantage to do  
7 that, and they refrained from doing that as a group.

8 Q And, Doctor, I am asking you as an economist,  
9 are you not putting economic theory above the safety  
10 and health of people when you say that?

11 A No, I actually think quite the opposite, I am  
12 putting the health and safety of people, as best  
13 understood by the scientists, first. I will repeat  
14 what I said a second ago. Hindsight is 20/20. We can  
15 always look back and say I wish we had known that  
16 then, if the only matter is that we didn't understand  
17 and now we do understand. I find it a little bit more  
18 troubling when people understood and chose not to tell  
19 people, because it was in their economic interest not  
20 to tell people.

21 Q Let's just use one example of what people  
22 understood. You mentioned the palladium cigarette as  
23 a safer cigarette that should have been advertised, is  
24 that correct, should have been marketed and  
25 advertised?

03347

1 A I think that the XA palladium treated  
2 cigarette was an example of a cigarette that had  
3 better health characteristics, at least according to  
4 the tests, and according to the documents that Liggett  
5 & Myers had at the time. And my understanding of  
6 those, and that that product was not advertised --  
7 that was not marketed because Liggett & Myers was part  
8 of the cartel.

9 Q Cartel. I will use your term. I will come  
10 back to this in a little more detail later. Let's  
11 just take that.

12 That XA product -- that product was made with  
13 a substance called palladium, is that correct?

14 A I think I did mention that substance, yes.

15 Q Did you tell the jury palladium is a  
16 substance that is toxic and poisonous to the human  
17 body?

18 A I'm not even sure that I am aware that is  
19 true.

20 Q So you have seen no indication that palladium  
21 is toxic and poisonous to the human body?

22 A If, in fact the documents that Liggett had --  
23 the documents I reviewed regarding the XA product  
24 indicated that Liggett was concerned about the  
25 possibility that palladium might be toxic. They took

03348

1 that issue seriously. The documents that I have read  
2 said that Liggett had mice inhale their XA cigarette  
3 smoke for two years. They could find no evidence of  
4 palladium in any of the organs or in the mouse as a  
5 whole after the two years.

6           They did studies of workers in palladium  
7 mills and palladium mines and found no evidence. They  
8 took that issue seriously and they could find -- that  
9 was their viewpoint at the time, anyhow, they could  
10 find no evidence that this cigarette was unsafe  
11 because it contained palladium. It apparently  
12 contained it in such small amounts -- - in their view  
13 anyhow, was not unsafe.

14       Q     And let's talk about that. The biological  
15 testing Liggett did is with mice, is that correct?

16       A     That's my understanding, yes.

17       Q     And I just want to make sure I understand.  
18 Are you suggesting to this jury that back in 19- -- in  
19 1978 that Liggett, based on some mice testing, should  
20 have gone out and put a product into the market, put  
21 advertisements up on big billboards saying safer  
22 product based on what, painting tar on the back of  
23 mice, as opposed to doing an epidemiology study?

24       A     I want to be very careful here. Liggett did  
25 not propose to put up -- in fact, Liggett was going to

03349

1     be very cautious about what they were going to say  
2 about the product. They were going to say  
3 specifically that in their advertising that this  
4 product did not cause cancer in the mouse painting  
5 tests the way other cigarettes did. They wanted to be  
6 very very cautious.

7           I have seen a document where they said, they  
8 want to be very cautious we can substantiate every  
9 word. As I said, they went beyond simply the mouse  
10 painting test. They looked at palladium workers and  
11 people who worked in the mines and mills and they  
12 found no evidence that those people had diseases.

13           They felt -- I am just relying on their own  
14 viewpoint. They took this issue seriously, as far as  
15 I can tell, and they felt there was no risk.

16       Q     Should they have advertised it as a safer  
17 cigarette, in your opinion, Doctor?

18       A     I think they should have advertised it  
19 truthfully.

20       Q     Without any epidemiological studies, is that  
21 your opinion?

22       A     My opinion is if the FTC would have allowed  
23 them to advertise it truthfully without any  
24 epidemiologic studies, then that's what they should  
25 have done.

03350

1       Q     Let me ask you this. In order for us to be  
2 certain that a cigarette is safer or less hazardous,  
3 what constituents of cigarette smoke have to be  
4 technologically removed before we can be certain that  
5 cigarette smoke will not harm people?

6       A     I can't answer that question. I don't have  
7 the scientific background to answer that.

8       Q     You mean you don't know, do you?

9       A     That's what I just said.

10       Q     And you don't know whether -- in fact, do you  
11 know whether the scientific community has ever  
12 announced that it has actually discovered the specific  
13 constituent or constituents of cigarette smoke that  
14 actually caused, let's say, lung cancer?

15       A     No. I don't know what specific -- I know of  
16 certain substances, because I have read about them,

17 benzapyrene is the one that comes to mind, but I am  
18 not an expert on the chemistry of cigarette smoke or  
19 which of the five thousand or three thousand or  
20 however many thousand compounds there are have been  
21 linked to cancer or to the promotion of cancer and so  
22 forth, you would really need to talk to one of the  
23 medical people about that.

24 Q And as you said, you at least have learned  
25 there is between four to five thousand constituents --

03351

1 chemical constituents in cigarette smoke, is that  
2 correct?

3 A Yes. I have seen numbers like that, yes.

4 Q I will leave this topic -- would you agree  
5 that trying to determine what constituents or  
6 constituents of those five thousand to remove to be  
7 certain that a cigarette, for example, won't cause  
8 lung cancer, is a complicated subject matter?

9 A Apparently so. You would have to ask one of  
10 the scientists to know for sure. It is outside of my  
11 area of expertise.

12 Q Do you know whether the scientific community  
13 has ever announced that it has ever discovered the  
14 actual biological mechanism by which cigarette smoke  
15 interacts with the human body cells to cause disease?

16 A No, that's not the kind of research that I  
17 would read.

18 Q Well, let me ask you something that may be  
19 more in your understanding as an economist. In  
20 rendering your opinions to this jury about safer  
21 cigarettes and what should have been done to advertise  
22 them, did you see evidence when you were doing your  
23 work that indicated to you that our federal government  
24 has concluded that it is simply not possible to make a  
25 safer or less hazardous cigarette?

03352

1 A I'm not sure I have seen that evidence.

2 Q Are you aware of a ten-year project  
3 undertaken by our federal government to work with the  
4 tobacco companies in an effort to develop a safer and  
5 less hazardous cigarette?

6 A I am not certain, no.

7 Q Have you become familiar, in preparing for --  
8 in preparing for this case, with what is known as the  
9 Tobacco Working Group?

10 A I have heard of the Tobacco Working Group,  
11 yes.

12 Q Let me see what you have heard and I will  
13 tell you what Dr. Burns has told the jury about the  
14 Tobacco Working Group, and see if it is consistent  
15 with what you have heard or evaluated as evidence in  
16 this case.

17 That the Tobacco Working Group was formed in  
18 1968 by the National Cancer Institute, and it was  
19 established to be a joint, cooperative effort with  
20 the public health community, scientific community, and  
21 the tobacco companies to develop a less hazardous  
22 cigarette.

23 Have you at least heard that much about it?

24 A I think I understood that, yes.

25 Q And you understood that the group was

03353

1 actually appointed by the director of the National

2 Cancer Institute? Did you know that?  
3 A No, I'm not sure I knew that.  
4 Q Did you know that the group consisted of  
5 scientists and representatives from government, the  
6 public health community, and the tobacco industry?  
7 Did you know that much?  
8 A I think I understood that, yes.  
9 Q And you understood what it was called the  
10 Tobacco Working Group?  
11 A Yes. I have heard that term, yes.  
12 Q And have you heard, or did you learn in  
13 preparing for this case that that group, that  
14 government group working with the tobacco companies  
15 carried on less hazardous cigarette research for  
16 approximately nine years, from 1968 until 1977?  
17 Did you learn that?  
18 A I was not aware of that, no.  
19 Q Did you learn that that group met on a  
20 regular basis to try to develop a less hazardous  
21 cigarette?  
22 A I was not aware of that, no.  
23 Q Were you aware that among other things this  
24 government program involved designing a variety of  
25 experimental cigarettes in order to try to identify  
03354  
1 the characteristics of cigarettes that might be safer  
2 or less hazardous?  
3 A No, I was not aware -- I am not aware of the  
4 details of what they did.  
5 Q Were you at least aware that after nine years  
6 of research that the -- that the Tobacco Working Group  
7 had concluded that it was unable to successfully  
8 develop a less hazardous cigarette? Were you aware of  
9 that?  
10 A No, I was not aware of that.  
11 Q Were you aware that the government -- were  
12 you aware that the National Cancer Institute closed  
13 down the research project because the government felt  
14 it was simply not possible to create a safe cigarette?  
15 A I was not aware of that.  
16 Q Now, I represent to you that Dr. Burns  
17 testified to that to this jury. I would assume you  
18 would accept that as true.  
19 A I will take your word for it. The jury knows  
20 what Dr. Burns testified to.  
21 Q With the government reaching that conclusion  
22 after ten years, does that affect your opinion as to  
23 whether the tobacco companies somehow should have been  
24 able to develop a safer cigarette sooner?  
25 A No, not particularly. The tobacco industry  
03355  
1 did its own independent research and the documents  
2 indicate what the tobacco companies were able to do on  
3 their own.  
4 Q Well, you say not necessarily, but, Doctor,  
5 do you at least agree with the fact that our  
6 government had a nine-year project to try to develop a  
7 less hazardous cigarette with the tobacco companies,  
8 concluded it couldn't be done? Isn't that evidence,  
9 at least as an economist you would consider in  
10 concluding that maybe the tobacco companies were  
11 developing safer products as fast as they  
12 technologically could?

13 A I think that that's possible, but it is also  
14 entirely consistent with the notion that the tobacco  
15 companies were not really interested in developing  
16 safer cigarettes, at least jointly, and at least with  
17 the government. And in fact did on their own a  
18 variety of things, which the documents reveal they  
19 did.

20 Q My question is -- well, at least as an  
21 economist, would you like to have known about the  
22 evidence of the Tobacco Working Group before you  
23 concluded that this entire industry engaged in some  
24 collusive conduct to slow down the development of a  
25 safer cigarette? Would you at least like to have

03356

1 known about it?

2 A I might have. I might have.

3 Q Thank you.

4 Now, in preparing for your testimony, did you  
5 actually learn that not only the Tobacco Working Group  
6 came to that conclusion, did you learn that the  
7 surgeon general of the United States came to the  
8 conclusion that there is no such thing as a safe  
9 cigarette? Did you learn that in your preparation,  
10 sir?

11 A I think I have heard that opinion expressed,  
12 yes.

13 Q Where did you hear it?

14 A I'm not sure where.

15 Q Let me show you what the evidence is. Maybe  
16 this will refresh your recollection. I will show you  
17 what is State Exhibit 3672. This is, again, the 1981  
18 surgeon general report. And I will show a quote on  
19 page Roman numeral VI.

20 So you see, Doctor, that this is the 1981  
21 surgeon general report. Did you ever see this?

22 A I have not read that document, no.

23 Q Can you see it there?

24 A I can't --

25 Q Let me go in on it. Can you see it a little

03357

1 better now?

2 A I can see it better.

3 Q Thank you. That is the surgeon general  
4 report of 1981?

5 A Yes.

6 Q And the surgeon general in 1981 set forth  
7 here what is called -- do you see where it says here  
8 are the basic findings of this report --

9 A Yes.

10 Q -- right above where I have underlined in  
11 yellow?

12 A Yes.

13 Q Let me just back up a little bit here so you  
14 can see it -- the whole sentence.

15 The Surgeon General of the United States  
16 said, there is no safe cigarette and no safe level of  
17 consumption.

18 Do you see that?

19 A Yes, I see that.

20 Q My question is, did you take that into  
21 consideration in connection with reaching your opinion  
22 that the tobacco companies somehow engaged in  
23 collusive conduct to slow down the development of a

24 safe cigarette product?

25 MR. FERGUSON: Objection. Misstates his

03358

1 testimony.

2 THE COURT: Please rephrase.

3 BY MR. WEBB:

4 Q Did you take what I just showed you, the  
5 conclusion of the surgeon general, when the surgeon  
6 general said there is no safe cigarette and no safe  
7 level of consumption, did you take that into  
8 consideration when you reached your opinions that the  
9 tobacco companies had engaged in collusive conduct to  
10 slow down the development of a safer cigarette  
11 product?

12 A I think I did. I think I was aware that  
13 there was -- the general feeling, again I'm not a  
14 medical doctor, but the general feeling was there was  
15 no such thing as a totally safe cigarette, but that it  
16 would be possible. In fact, the industry documents  
17 indicate that the firms were able to produce  
18 cigarettes that were safer on some of the important  
19 dimensions.

20 Q Although ultimately the answer is not whether  
21 they are safer, it is whether they can be advertised  
22 as safer, is that fair to say?

23 A I think that is an important part of the  
24 question.

25 Q Because you have told us as an economist, if

03359

1 you don't communicate to the public what the product  
2 is, then you can't expect the public to buy the  
3 product, is that correct?

4 A If you can't communicate -- for many products  
5 if you can't communicate to the public what the  
6 benefits of consuming it are, they will not have a  
7 good reason to buy it. Some products consumers can  
8 understand simply by trial and error.

9 Q You don't -- I'm sorry. Go ahead and finish  
10 your answer.

11 A A product like this, where there is something  
12 that is not clearly visible, or which the consumer  
13 can't experience directly, they would presumably need  
14 to be informed.

15 Q You don't fault the tobacco companies --  
16 let's make sure -- as far as efforts to try to develop  
17 safer cigarette products that you have listed on this  
18 chart, you don't fault the tobacco companies for  
19 trying to develop safer products, do you?

20 A If that's in fact what they were doing, no, I  
21 don't. I fault them for not competing on the basis of  
22 that safety.

23 Q Advertising?

24 A Competing.

25 Q Well, is advertising competing?

03360

1 A It is part of competing.

2 Q As far as whether safer cigarettes are even  
3 realistic or technologically feasible, Doctor, have  
4 you done a study or a review of cigarettes  
5 manufactured by other large cigarette companies  
6 throughout the world, beyond the United States, in  
7 order to determine if cigarette products have actually  
8 been manufactured and introduced into the marketplace

9 somewhere else in the world?  
10 Have you done a study of that?  
11 A No. In fact I have seen no evidence in all  
12 the documents I have read that any of the domestic  
13 cigarette manufacturers were concerned -- let me back  
14 up from that answer a little bit, because I want to  
15 hold British American Tobacco and the United Kingdom  
16 aside.

17 Q Do you remember my question?

18 A I am trying to answer. I think I misstated  
19 something for a second.

20 Q Do you remember the question?

21 A The question was in the rest of the world --

22 Q I asked you --

23 MR. FERGUSON: Mr. Webb, could you allow him  
24 to answer?

25 I object, your Honor.

03361

1 THE COURT: Why don't you re-ask the  
2 question.

3 And then you can answer it fully.

4 MR. WEBB: Thank you, your Honor.

5 BY MR. WEBB:

6 Q My question was, have you done a study or a  
7 review of cigarettes manufactured by other companies  
8 outside the United States to determine if any of those  
9 other companies outside the United States have  
10 actually been able to manufacture and introduce into  
11 the marketplace a safer cigarette, safer than we have  
12 in the United States?

13 Have you done a study of that?

14 A I wouldn't say I have done a specific study  
15 of it, but issues along those lines have arisen in my  
16 review of the documents.

17 Q And my question, do you agree with me that if  
18 it is possible to manufacture safer cigarettes --  
19 don't you believe it is possible that somewhere in the  
20 world during the past forty-five years such a project  
21 -- such a product would have been manufactured by some  
22 company somewhere?

23 A No, I don't think that necessarily follows at  
24 all.

25 Q Let me ask you, there are major large

03362

1 corporations outside of the United States that  
2 manufacture cigarettes, is that correct?

3 A That is correct.

4 Q And am I correct, if I understand your  
5 testimony, and based on the evidence you have seen you  
6 are not aware of any major breakthrough or new  
7 technology that led to some revolutionary new safer  
8 cigarette product by one of these companies?

9 A I am aware that the Imperial Tobacco Company  
10 of Canada was beginning to do research down those  
11 lines and was told by British American Tobacco that  
12 that was something they shouldn't do. I view that as  
13 being consistent with a cartel or conspiracy not to  
14 develop safer products. I have not seen any  
15 indication that any company anywhere else in the world  
16 has produced a safer product quite. Quite to the  
17 contrary, there are indications that in the rest of  
18 the world companies are involved in the same sorts of  
19 agreements to share research, to not advertise on the

20 basis of health and so forth that are -- that I  
21 believe are occurring in this country.

22 Q I'm sorry. Do I understand that you now  
23 believe there is a worldwide conspiracy of all  
24 countries in the world not to develop safer  
25 cigarettes?

03363

1 A I did not say that.

2 Q Let me ask you this. Let's take Japan. That  
3 is a fairly large nation, is that fair to say?

4 A It is a fairly small nation with a fairly  
5 large number of people.

6 Q I apologize. It has a fairly large  
7 population?

8 A Yes.

9 Q Japan has a major tobacco company called the  
10 Japan Tobacco Company, is that correct?

11 A That's correct.

12 Q Have you seen any evidence that the Japan  
13 Tobacco Company has developed any safer cigarette  
14 product than we sell in the United States?

15 A No, I have not.

16 Q Let's take the nation of China. China has a  
17 large company that manufactures cigarettes called the  
18 China National Tobacco Company, is that correct?

19 A I was not aware of that. I will take your  
20 word for it.

21 Q Were you aware that they actually have  
22 thirty-three percent of the world market?

23 A I am not sure from an economic standpoint it  
24 is right to think of it as a world market. I believe  
25 that they probably sell -- I am willing to take your

03364

1 word for it that they sell thirty-three percent of the  
2 cigarettes made in the world.

3 Q Actually that's not so. Have you seen any  
4 evidence that the China National Tobacco Company  
5 developed any cigarette product safer than we sell in  
6 the United States?

7 A No.

8 Q Have you seen -- there is another large  
9 cigarette company in France called Seita, S-e-i-t-a.  
10 Have you heard of that company?

11 A I have heard of that company.

12 Q Have you heard any evidence that Seita has  
13 ever developed any safer cigarette, safer than we sell  
14 in the United States?

15 A No.

16 Q Spain has a tobacco company that is fairly  
17 good sized called -- I will try to pronounce it,  
18 Tabacalera, SA, have you heard of that? It is spelled  
19 T-a-b-a-c-a-l-e-r-a, SA.

20 Have you heard of that company?

21 A I have not heard of that company, but I will  
22 take your word for it that they exist.

23 Q I take it you have not seen any evidence that  
24 that company has not developed any safer cigarettes  
25 products than we have in the United States?

03365

1 A No.

2 Q Have you heard of a company in Italy called  
3 MS Lido, L-i-d-o, that manufactures -- it is a large  
4 company manufacturing cigarettes?



5 A Is that the Italian tobacco monopoly, what is  
6 commonly referred to as the Italian tobacco monopoly?

7 Q The name of it, as I understand it, is Lido,  
8 L-i-d-o.

9 A In the documents that I have seen in  
10 references to the Italian industry is a monopoly, a  
11 government run monopoly. I will take your word for it  
12 that that is the company.

13 Q Have you seen any evidence that that company  
14 has manufactured any cigarettes safer than we have in  
15 the United States?

16 A No.

17 Q Let me ask you this, as an economist -- tell  
18 me if I am right, and I am going to be on your turf,  
19 so you will probably educate me. I will talk about  
20 economics for a minute.

21 A I will do my best.

22 Q I am sure you will be able to help me. As an  
23 economist, if you start to study an industry, looking  
24 for signs as to whether there is signs of collusion in  
25 the market, or it may not have collusion, there are

03366

1 certain indicators that an economist begins to look  
2 for as you start afresh studying a market, is that  
3 fair to say?

4 A Yes.

5 Q And one of the things that an economist looks  
6 at when he or she starts to analyze -- study a market  
7 is -- and is looking for signs of collusion or lack of  
8 collusion, one of the things an economist looks at is  
9 whether the companies that are in that market, whether  
10 they are holding on to the same market share year  
11 after year after year, or whether the market share is  
12 changing, either gradually or significantly year after  
13 year after year? Is that one factor you try to look  
14 at as an economist?

15 A It could be important, depending on the sort  
16 of collusion or conspiracy that one was concerned  
17 about.

18 Q If we look at standard textbooks on  
19 economics, that is certainly one factor you would look  
20 at, whether or not the members of the industry are  
21 just keeping the same market share or whether the  
22 market share is changing, is that fair to say?

23 A What I would say is fair, if you believe that  
24 the members of the industry have a cartel to divide  
25 the market and fix the price, in that situation you

03367

1 would look at constituency of market shares, that's  
2 correct.

3 Q And as you, as a an economist, begin to look  
4 at a market and analyze this factor of market share,  
5 if you saw -- strike the question.

6 Let's take a market, to use your term, that  
7 is concentrated. You called it an oligopoly?

8 A Yes.

9 Q I will call it a concentrated market.

10 A I can live with that.

11 Q If you, as an economist, are starting to  
12 analyze a concentrated market, which the tobacco  
13 company you called a concentrated market.

14 A I believe it is a concentrated market, as you  
15 use the term. I believe it is an oligopoly.

16 Q So if you, as an economist, were beginning to  
17 look at an industry that had a concentrated market,  
18 small number of companies, if you saw as an economist  
19 that the four, five, six, seven, eight companies that  
20 were part of that industry year after year after year  
21 were each holding on to about the same market share,  
22 that might cause you to, at least as an economist,  
23 say that is a potential indication of collusion?

24 A Of collusion on one dimension, yes.

25 Q If you saw, on the other hand, that there was

03368

1 significant shifting of market share year after year  
2 after year after year among the competitors, at least  
3 that would be an indication to you as an economist  
4 that this was a competitive market without collusion?

5 A No, I would not reach that conclusion. I  
6 think you have gone a step too far there.

7 Q Let me ask you this. Have you studied --  
8 let's talk about the tobacco industry.

9 A Okay.

10 Q In doing your economic analysis of the  
11 tobacco industry and trying to determine if there is  
12 collusion in this market, have you looked at the issue  
13 of the market share that has been held by the various  
14 companies in the industry going back to, let's say,  
15 the Plaza Hotel, December of 1953, all the way up to  
16 today?

17 Have you looked at the market share issue?

18 A Sure.

19 Q Okay. And let's tell the jury what you see  
20 as an economist -- let -- I will ask you some  
21 questions and see if I am correct about it.

22 A Okay.

23 Q If you, as an economist, take a look  
24 backwards for the past forty-five years or so, what  
25 you see is that there have been large shifts and

03369

1 changes in the market share among the major cigarette  
2 manufactures, is that correct?

3 A There have been some large changes in the  
4 shares of cigarette manufacturers in the U.S.  
5 marketplace, that's correct.

6 Q In fact, do you agree that that market share  
7 shift would indicate to you that there has been  
8 intense competition in the marketplace in connection  
9 with the sale of cigarettes?

10 A No, I would not characterize it that way.  
11 No. The answer is no.

12 Q Then let me ask you this. You are aware,  
13 then, if you studied the market share shifts, that in  
14 1953, 1954, right after the Plaza Hotel meeting, that  
15 my client, Philip Morris, was the smallest of all the  
16 companies selling cigarettes in the United States,  
17 with 8.7 percent of the market, is that correct?

18 A That sounds -- I would have to look at the  
19 actual numbers. Over fifty years and six companies,  
20 that is three hundred numbers, and I don't have all  
21 three hundred of them memorized.

22 Q I will show you something.

23 A If we could look at some numbers, that would  
24 be fine.

25 Q Let me help you with some numbers, then.

03370

1 I am now going to put on the screen what has  
2 been marked as Defense Demonstrative Exhibit 5215,  
3 which is a chart that reflects market shares during  
4 periods of time. I am going to have to back up here.  
5 I am going to hand you a copy of this.

6 A I can read it. I don't know if the jury can.  
7 I can read it. You need the other lamps, I think is  
8 your problem. You need to turn on the auxiliary  
9 lights above. Maybe not. I use one of these when I  
10 teach.

11 Q I think the light is not helping us.

12 A JUROR: It is better.

13 MR. WEBB: Was it better with the light on?

14 A JUROR: It is better now.

15 BY MR. WEBB:

16 Q I apologize. I made this chart too dark.

17 You can see this column here reflects 1954  
18 share of the market?

19 A That's correct.

20 Q And this represents the 1996 share of the  
21 market?

22 A That's correct.

23 Q And did you review what are known as the  
24 Maxwell documents or Maxwell reports in connection  
25 with market share?

03371

1 A I have seen some of the Maxwell reports and  
2 I have seen data that were generated in the Maxwell  
3 reports. And these numbers are consistent with that.  
4 I won't quibble about these numbers.

5 Q I will tell you these are based on Maxwell  
6 reports. I have simply put them in chart form so we  
7 could see them a little easier.

8 A I have seen very similar numbers from a  
9 variety of sources. I won't quibble with these  
10 numbers. I think they are probably accurate. At  
11 least comparable to what I have seen, yes.

12 Q Actually I misspoke on one issue. I said  
13 Philip Morris was the smallest company in 1954. And  
14 it actually looks like Lorillard was the smallest.

15 A I was going to call you on that one, but the  
16 numbers I was going to think of were for 1950, and I  
17 wasn't positive what happened in 1954.

18 Q You are correct. Call me if you think I make  
19 a mistake.

20 A You said '54, what I had in mind was '50, so  
21 I don't want to quibble.

22 Q There is no question, Philip Morris was a  
23 relatively small company, at least back in 1954, it  
24 had 8.7 percent of the market share.

25 A It had a relatively small share in the market

03372

1 at that point.

2 Q And you are aware that today Philip Morris  
3 has climbed up to 47.8 percent?

4 A Yes.

5 Q That's a five hundred percent increase, five  
6 time increase?

7 A Roughly, yes.

8 Q A little more than five times?

9 A I can't do the math in my head.

10 Q 8.7, nine times five is forty-five. So  
11 roughly five hundred percent.

12 A Sure.  
13 Q Would you agree that that is a pretty  
14 substantial shift of market share, at least as far as  
15 my client is concerned?  
16 A Yes.  
17 Q And that would indicate to you that my client,  
18 Philip Morris, has to be competing pretty aggressively  
19 in the marketplace as a competitor in order to go from  
20 8.7 percent to 47 percent -- to 47.8 percent?  
21 A What I would say is I believe your client has  
22 been competing very vigorously along the lines of  
23 image and taste and advertising, but not necessarily  
24 along the lines of price or product quality, at or in  
25 regards to safety and health. I think I said this

03373

1 this morning, that the industry has continued, as it  
2 did in the '30s and '40s and '50s, to compete on the  
3 basis of image, productivity, taste.  
4 Your company had the Marlboro man, which was  
5 a very effective advertising campaign. Someone told  
6 me -- I am just taking their word for it, that  
7 Marlboro is a better recognized brand name than  
8 Coca-Cola worldwide. And I thought that was quite  
9 remarkable. So your company has done a lot of  
10 advertising on image and name and taste.  
11 That is not to say that they have been  
12 advertising aggressively on either price or the safety  
13 of the products.

14 Q But the point is, you can't go -- Doctor, let  
15 me ask you, as an economist, are you suggesting that  
16 my client, Philip Morris, did not have to be  
17 competitive in the market in order to go from 8.7  
18 percent to 47.8 percent?

19 A Say that they had to compete at least along  
20 one dimension. And the dimension I suggest that I  
21 believe they are competing along is in image and  
22 advertising and programs, the taste of the product. I  
23 don't smoke, so I can't tell you whether Marlboros  
24 taste better than Kent or Kools or anything else, but  
25 in terms of providing those things to customers, I

03374

1 think Philip Morris probably has competed very  
2 vigorously.

3 In terms of the other dimensions of  
4 competition that I have mentioned, such as price or  
5 product safety, product quality in terms of safety and  
6 health, I don't believe they have been competing.

7 Q That's your collusive -- you say, according  
8 to your chart here, that all of those companies up on  
9 that screen that are in this market have actually not  
10 been competing on the basis of health, that's number  
11 one, right?

12 A They have been working to suppress  
13 competition on the basis of health, yes.

14 Q Let's talk about that. Each one of these  
15 companies was part of this collusive arrangement. I  
16 know Liggett was only in it for some period of time,  
17 but all of them are part of it, according to you.

18 A That's correct.

19 Q And just so I understand, for example, while  
20 Philip Morris is fighting in the market to go from 8.7  
21 to 47.8, that market share is coming out of the hide  
22 of some other competitors, isn't it?

23 A Yes, somebody -- the shares have to add up to  
24 one hundred percent.

25 Q Somebody is losing sales in the marketplace?

03375

1 A That's correct.

2 Q Let's take American Tobacco Company. It  
3 virtually -- in 1954 it was the largest cigarette  
4 manufacturer and went down to zero -- virtually zero  
5 and was purchased by Brown & Williamson, is that  
6 correct?

7 A Yes. The zero is perhaps a little  
8 misleading. They did merge. They merged with Brown &  
9 Williamson. But they -- I will not dispute the fact  
10 that American Tobacco went from being the largest firm  
11 in terms of market share to being one of the smaller  
12 ones. That's correct. Before it was --

13 Q Before it was acquired by B&W?

14 A Before it was merged, yes.

15 Q Liggett, for example I had Mr. LeBow testify,  
16 it has gone from 16.2 percent down to 1.9 percent?

17 A Yes, with some ups and downs in between,  
18 that's correct.

19 Q Now, let's just focus on American Tobacco and  
20 Liggett, the ones that seem to have lost the market  
21 share.

22 A Okay.

23 Q As they were losing the market share over the  
24 years, is it your testimony as an economist that if  
25 they had the opportunity to develop and advertise a

03376

1 safer cigarette product that would actually help them  
2 hold on to their market share, are you telling the  
3 jury that they would have just sat back, done nothing,  
4 and just let their whole company go down the drain  
5 because they had some collusive side agreement?

6 Is that what you are telling the jury?

7 A I am telling the jury that I think that the  
8 opportunity to produce a safer cigarette is there, and  
9 that there would be a benefit -- a financial benefit,  
10 an economic benefit to the firm that did it, and the  
11 fact that they didn't do it -- and the documents that  
12 support that view suggest that the reason why they  
13 didn't do it was as part of a collusive agreement.

14 Liggett worked until 1978 to try to develop a  
15 safer cigarette. And Liggett was a firm that was  
16 losing market share and was going down the drain, as  
17 you put it. And it is my opinion, my understanding  
18 from what I have seen and read the reason why Liggett  
19 didn't take that step was because the rest of the  
20 industry, other firms in the industry threatened to  
21 crush them if they did.

22 Q What you are testifying -- it does -- are you  
23 telling the jury it makes economic sense to you that  
24 Liggett or American Tobacco Company would allow all  
25 their sales to go away and they would still say to

03377

1 themselves, well, we have this little side agreement  
2 on collusion on developing and advertising safer  
3 cigarettes, so we are going to lose our entire market  
4 share and not introduce into the market some safer  
5 product that we have?

6 Does that make economic sense to you?

7 A I wouldn't characterize it nearly the way you

8 said it.  
9 Q I am asking you, does it make economic sense?  
10 MR. FERGUSON: May he answer, your Honor?  
11 THE COURT: Yes.

12 BY MR. WEBB:

13 Q Does it make economic sense?

14 A Not the way you -- you characterize it as a  
15 little side agreement. I believe it is something much  
16 more than a little side agreement.

17 Q Call it a big side agreement.

18 A I think it is an -- it was an important set  
19 of agreements within the industry. And I think it  
20 does make sense as the evolution of the industry took  
21 place. American Tobacco didn't go from thirty-three  
22 percent to zero overnight, it took them a while to do  
23 that. And as their market share declined and they  
24 were taking part in this agreement, these various sets  
25 of agreements that I have described, and I think that

03378

1 the documents reveal quite clearly, basically they got  
2 locked into this, because after having spent, say, ten  
3 years telling the public that they were not selling an  
4 unsafe product, refusing to admit that cigarettes were  
5 causing cancer, challenging the sort of epidemiology  
6 studies that this morning you suggested were the only  
7 true way to know things, but in fact the industry  
8 said it is just statistics, it really doesn't tell us  
9 anything. After doing that for ten years they were  
10 really locked into this. In my view it is the big  
11 lie.

12 The problem is that they told people that  
13 cigarettes were safe, they challenged the medical  
14 community when the medical community said otherwise.  
15 They challenged the epidemiology studies. Ten years  
16 later, say by 1964, the concern became if we now go  
17 ahead and market a safer cigarette, we are going to  
18 open ourselves up to litigation on the grounds we have  
19 been selling an unsafe product.

20 And it runs throughout the documents that  
21 starting in the '60s there was concern about selling  
22 an unsafe cigarette, having said for the past ten  
23 years that it was safe.

24 So in the '50s and '60s when American's share  
25 wasn't zero, but say in the twenty percent range, it

03379

1 might have made sense to stick with the agreement. By  
2 the time the '60s rolled around I believe that the  
3 industry and American was very much locked into this,  
4 they really could not get out of it.

5 Q Is the answer to my question yes?

6 A I think it makes economic sense. I tried  
7 to explain it.

8 Q It makes economic sense to you that American  
9 Tobacco Company would allow virtually its entire  
10 market share to be taken away from it, and Liggett  
11 would do the same thing, and that even if they had,  
12 even if they were technologically able to develop a  
13 safer cigarette, and offered into the market and  
14 regained their market share, they would not do that  
15 because they had this agreement, is that your  
16 testimony?

17 Is that your testimony?

18 A I'm not sure I want to let you characterize

19 quite what my testimony was. I will tell you again  
20 what my opinion is.

21 I think that Liggett, as the market share  
22 declined, had a strong incentive, I think generally  
23 firms had an incentive to cheat on the agreement and  
24 do the sorts of things they had agreed not to do. And  
25 I think that Liggett actually pursued that until the

03380

1 industry reined them back in and threatened them and  
2 told them if you go ahead and do this, we will  
3 annihilate you, I think was the word that was used.

4 I think that American Tobacco early on -- it  
5 wasn't zero in the 1960s, it was declining from  
6 thirty-three percent, but I think it was still a  
7 significant player in the market at that time. At  
8 that time they had an incentive to stick with the  
9 agreement, and by the time the '60s and '70s rolled  
10 around, and as their market share continued to  
11 decline, I really think they had no choice but to  
12 stick with it, because by this point the threat of  
13 litigation was a very serious one.

14 Q Let me try to get at that time this way --

15 A That makes economic sense to me as an  
16 economist.

17 Q If it makes economic sense to you, let me ask  
18 it this way.

19 Will you please tell this jury what other  
20 industry you have studied as an economist where you  
21 have seen this much competition with the major  
22 shifting of market share sales over the years, while  
23 at the same time it was proven that competing  
24 companies had entered into anti-competitive agreements  
25 on some issues?

03381

1 What industry have you studied that you have  
2 seen that in?

3 A I'm not sure I have studied any industry that  
4 has -- I'm not sure I could point to any industry in  
5 which there were collusive agreements of this type.  
6 Usually the sorts of collusive agreements we expect to  
7 see, the most common ones are ones having to do with  
8 price, where it is much more likely that market share  
9 arrangements have been made. But, no, I can't point  
10 to one.

11 The fact that these firms were competing on  
12 advertising and image, not health and safety  
13 advertising, but image advertising, on the safety of  
14 their product, and as a result of that market shares  
15 changed, doesn't change my opinion that on other  
16 important dimensions of competition they were  
17 included.

18 Q So the answer to my question is you can't  
19 think of any?

20 A I can't think of one as I sit here, no.

21 Q Thank you.

22 Now, let's go through -- start to go through  
23 these four collusive arrangements, you call them, that  
24 you have listed here. Let's start with the first one  
25 here, what you called the arrangement not to advertise

03382

1 on the basis of health. You put down here 1953,  
2 Plaza. I believe you testified it is your belief that  
3 this agreement was entered into in 1953 at the Plaza

4 Hotel, is that correct?  
5 A I think the genesis of that agreement is --  
6 was at the December 1953 meeting, excuse me, in the  
7 Plaza Hotel.  
8 Q Next I asked you, is that where the agreement  
9 was reached among the competitors?  
10 A I'm not sure I could date specifically when  
11 in the minds of the competitors they had agreed to  
12 something. I think that the beginning -- I date it at  
13 that point in time.  
14 Q Okay --  
15 A I don't believe it started earlier than that.  
16 Q Pardon me?  
17 A I don't believe it started any earlier than  
18 that.  
19 Q Was the agreement actually entered -- my only  
20 question, are you telling the jury that the agreement,  
21 this arrangement was actually entered into at the  
22 Plaza Hotel that day?  
23 A I think -- my understanding is, my belief is  
24 at that point in time the members of the industry got  
25 together with the Hill and Knowlton public relations

03383

1 firm and agreed -- and set along a framework of  
2 agreement -- if you are asking me at what point in  
3 time did each CEO say, okay, we have agreed to  
4 something, I can't tell you that. I think the genesis  
5 of it is at the 1953 meeting.  
6 Q I only represent one defendant, that is  
7 Philip Morris. I want -- when did Philip Morris enter  
8 into this agreement?  
9 A I can't date it specifically. I believe it  
10 started -- it was as a result of that meeting, and it  
11 was shortly after that meeting. I think by June of  
12 1954 the agreement was effective.  
13 Q You can't tell the jury when my client  
14 entered into this agreement?  
15 A Not to a specific date or day. I think  
16 between December of 1953 and June of 1954, somewhere  
17 in there. I think the first discussion of it was, as  
18 far as I am aware the first discussion was in December  
19 of '53. I believe by June of '54 it was already  
20 active, it was already in place. I can't narrow it  
21 down more tightly than that.  
22 Q I am going to try to, because I represent  
23 Philip Morris. Did Philip Morris do anything at the  
24 December 1953 Plaza Hotel? Did Philip Morris do  
25 something that you believe shows you that they entered

03384

1 into this agreement at the Plaza Hotel?  
2 A I think they met with the CEO -- the CEO of  
3 Philip Morris met with the CEO of the other tobacco  
4 companies and discussed, along with the Hill and  
5 Knowlton people, the crisis that they were facing, and  
6 they had a list of things to do.  
7 Q My question --  
8 A That's what I think they did. That's what I  
9 think they did.  
10 Q They entered the agreement that day, Philip  
11 Morris?  
12 A I am not going to say that they entered the  
13 agreement that day. I can't tell you to the day when  
14 it was that the Philip Morris person decided that they



15 had an agreement or they didn't have an agreement. I  
16 think by June of 1954 their behavior was consistent  
17 with that agreement.

18 Q Okay. Well, I will get to that in a moment,  
19 but --

20 Your Honor, I can break now if you would  
21 like.

22 THE COURT: That's fine. We will break.  
23 We will see you at 1:30.  
24 (Luncheon recess.)

03385

1 (Afternoon Session)

2 THE COURT: Please sit down.

3 MR. WEBB: May I proceed, your Honor?

4 THE COURT: Yes.

5 BY MR. WEBB:

6 Q Dr. Solow, are you ready to proceed?

7 A Yes.

8 Q Okay. Now, Doctor, when we left off for our  
9 lunch break I had been -- began to ask you some  
10 questions about this agreement number one, the  
11 arrangement not to advertise on the basis of health.

12 Do you see that?

13 A Yes.

14 Q And you had written down here that this  
15 happened in 1953 at the Plaza, meaning the Plaza  
16 Hotel, is that correct?

17 A Yes.

18 Q You also said this other arrangement to  
19 mislead the public about smoking and health, that also  
20 was arrived at in 1953 at the Plaza Hotel, is that  
21 correct?

22 A That's what it says, yes.

23 Q Okay. Now, because you put so much emphasis  
24 on the Plaza Hotel meeting, I would like to talk about  
25 that for a few minutes.

03386

1 That took place on December 15th, 1953, is  
2 that correct?

3 A I will take your word for it on the date.

4 Q Let's look.

5 A If you would refresh my memory to the actual  
6 date.

7 Q Let me put it on the screen.

8 MR. FERGUSON: Exhibit number?

9 MR. WEBB: Yes, I will. This is State  
10 Exhibit number 17.

11 MR. FERGUSON: Thank you.

12 BY MR. WEBB:

13 Q Now, this is a document dated December 15th,  
14 1953.

15 Do you see that?

16 A Yes, I do.

17 Q You can see the date?

18 A Yes.

19 Q And I believe you -- you testified it was  
20 your understanding this was a document that was  
21 actually -- well, do you know who prepared this  
22 document?

23 A My understanding it was prepared by the Hill  
24 and Knowlton public relations people.

25 Q Now, is this the meeting -- this meeting here

03387

1 with this document that is marked as defense -- as  
2 State Exhibit 17, is this the meeting that you are  
3 referring to when you wrote the words on this chart  
4 1953 Plaza?

5 A Yes, I think so.

6 Q Okay. Now, just so the jury understands what  
7 was actually going on, if we go back to that time,  
8 December 15th, 1983, do you agree, Doctor, that there  
9 was a very legitimate and understandable reason why  
10 the executives of the tobacco companies were coming  
11 together to have a meeting on that date? Is that fair  
12 to say?

13 A First of all, I think you misspoke and said  
14 1983.

15 Q I apologize. Do you know what I am talking  
16 about?

17 A This particular meeting. We have to be  
18 careful. I think that it is legitimate for CEOs of  
19 tobacco companies to be concerned about what is going  
20 on in their companies and in their industry, yes.

21 Q So there was a legitimate reason for them to  
22 get together to have this meeting, is that correct,  
23 Doctor?

24 A No, I wouldn't quite go that far. There was  
25 a legitimate reason for them to be concerned about

03388

1 what was happening in the industry. Whether it was a  
2 legitimate reason to have this meeting, I think  
3 depends on what went on during this meeting.

4 Q Well, let's -- first of all, the first page  
5 of the document tells us why they got together,  
6 doesn't it? I have highlighted the paragraph. It  
7 said very clearly on the first page of this document  
8 why these folks got together back in December 1953,  
9 forty-five years ago, doesn't it?

10 A Do you want me to read a particular piece of  
11 that? Would you point to a particular piece?

12 Q Does this paragraph here set forth why they  
13 got together? I will read it.

14 It says the group was called together by Mr.  
15 Paul Hahn, president of the American Tobacco Company,  
16 the chief executive officers of all the leading  
17 companies, R.J. Reynolds, Philip Morris, Benson &  
18 Hedges, U.S. Tobacco Company, Brown & Williamson, have  
19 agreed to go along with a public relations program on  
20 the health issue.

21 Do you see that?

22 A Yes, I see that.

23 Q Was that the reason why these folks got  
24 together that day on December 15th, 1983 according to  
25 this document?

03389

1 A According to those words, that's what those  
2 words say.

3 Q By the way, do you have any information --  
4 strike the question.

5 Have you gone out to actually interview any  
6 of the people that were at the meeting to find out  
7 additional information?

8 A No.

9 Q You have not done that?

10 A I have not interviewed the people that were  
11 at that meeting.

12 Q So the information you have about the meeting  
13 comes from this document?

14 A Yes.

15 Q Let's see. They got together to talk about a  
16 public relations program on the health issue --

17 A Actually, let me --

18 Q Go ahead.

19 A This document and other documents. There is  
20 a subsequent document, I recall, about what went on at  
21 the meeting, too, a subsequent Hill and Knowlton  
22 document. So it is this document and other documents  
23 that describes what went on at the meeting.

24 Q Let me make sure I understand. Is there  
25 another document that describes in more detail what

03390

1 happened at this meeting, is that what you are saying?

2 A The document that has the list of things to  
3 do. I believe it is a separate Hill and Knowlton  
4 document.

5 Q I know there are other Hill and Knowlton  
6 documents. My question is, is there another Hill and  
7 Knowlton document that gives us more detail of what  
8 happened at this meeting?

9 A My recollection is there is a second Hill  
10 and Knowlton document that describes what happened at  
11 this meeting.

12 Q And we will go to that next.

13 A The result of their discussions and so forth.  
14 Go ahead.

15 Q If we go to the next page of this document --  
16 by the way, the health issue that is referred there,  
17 from the work that you have done on this case to  
18 prepare for your testimony, Doctor, you are aware that  
19 the health issue being referred there was the health  
20 issue of whether smoking causes cancer, is that  
21 correct?

22 A That's my understanding, that that was the --  
23 that health issue plus the issue of the sort of  
24 advertising that was going on in the industry which,  
25 at least according to the documents, the executives

03391

1 understood was contributing to the problem that their  
2 industry was facing at the time.

3 Q I am asking, when they say the health issue,  
4 you do know -- when they say the health issue --

5 MR. FERGUSON: Objection. He is asking the  
6 witness to speculate what is in people's minds, beyond  
7 what is on the paper.

8 THE COURT: Overruled.

9 THE WITNESS: I understand that to be the  
10 concern that was arising from the epidemiological  
11 studies and Dr. Wynder's study that were linking  
12 cancer and smoking.

13 BY MR. WEBB:

14 Q Thank you. And that is a serious issue, do  
15 you agree, whether smoking --

16 A I would think that was a serious issue, yes.

17 Q Now, if you look at the next page of the  
18 document they get a little more detailed. I have  
19 highlighted some paragraphs. Let's look at these.  
20 Again, this is the same exhibit, this is the next  
21 page. It says the industry position -- do you see  
22 that, sir?

23 A Yes.  
24 Q You read this, did you not?  
25 A Yes.  
03392  
1 Q When you prepared for your testimony?  
2 A Yes.  
3 Q It says here, the industry -- that is  
4 referring to the tobacco industry, is that correct?  
5 A Yes.  
6 Q The industry is strongly convinced there is  
7 no sound scientific basis for the charges that have  
8 been made. The charges have been made is referring to  
9 the charges that cigarette smoking may cause lung  
10 cancer.  
11 Is that the charge?  
12 A Yes.  
13 Q They believe, meaning the industry, that the  
14 more sensational accusations in the recent papers were  
15 premature and in some cases represent publicly -- and  
16 in some cases represent publicly --  
17 A The word you are searching for is publicity.  
18 Q I'm sorry.  
19 -- represent publicity in the hopes of  
20 attracting funds and support for further research.  
21 They, meaning the tobacco company folks, point out  
22 that the National Cancer Institute of the United  
23 States Public Health Administration, which is a  
24 government agency and supported by Congressional  
25 appropriations, has officially refuted the tie-up

03393  
1 between cigarette smoking and cancer.  
2 The next paragraph I highlighted is that they  
3 feel, meaning the tobacco companies, they should  
4 sponsor a public relations campaign which is positive  
5 in nature and is entirely pro cigarettes. They are  
6 confident they can supply us with the comprehensive  
7 and authoritative scientific material which completely  
8 refutes the health charges.  
9 Now, you read those words, did you not,  
10 Doctor, when you prepared for your testimony?  
11 A I have read those words, yes.  
12 Q Now, just so the jury understands, if an  
13 industry believes that its product is being unfairly  
14 attacked, there is nothing wrong with people in that  
15 industry getting together and talking about a public  
16 relations campaign to address the attack --  
17 MR. FERGUSON: Objection. Calling for a  
18 legal conclusion.  
19 THE COURT: Rephrase.

20 BY MR. WEBB:  
21 Q Doctor, is it quite common in many industries  
22 that factually when their products are under attack,  
23 and if they feel that the attack on their products is  
24 unfair, it is quite common that the members of the  
25 industry will get together and try to develop a common

03394  
1 public relations strategy, is that correct?  
2 A I believe that sometimes industries do that,  
3 yes.  
4 Q That does not violate the antitrust laws.  
5 MR. FERGUSON: Object --  
6 MR. WEBB: Strike the question.  
7 BY MR. WEBB:

8 Q It is not uncommon for people in an industry  
9 to do, factually for them to get together to do that?

10 A I think I just said that is not necessarily  
11 uncommon, no.

12 Q And from an economic standpoint, if people  
13 get together to try to develop a public relations  
14 campaign to what they view to fairly defend their  
15 product, that is not an anti-competitive act, is it?

16 A If that is all they do, that would not be an  
17 anti-competitive act.

18 Q Some examples that come to my mind -- and I  
19 will see if they come to yours -- what has happened  
20 over the years, do you remember a time when actually  
21 the electric utility companies were under attack,  
22 people were contending that power lines cause cancer,  
23 do you remember reading about that, the allegation  
24 that power lines cause cancer?

25 A Vaguely, yes.

03395

1 Q Did you hear at the time or did you learn as  
2 an economist that a major trade association  
3 representing that industry called the Electric Power  
4 Research Institute got together and developed a public  
5 relations campaign to defend power lines against that  
6 attack?

7 A I actually worked for the Electric Power  
8 Research Institute when I was in graduate school. It  
9 wouldn't surprise me to find out that they had done  
10 the scientific analysis. Usually I thought the Edison  
11 Institute was the group that did the public relations  
12 stuff. It wouldn't surprise me to find out that the  
13 Electric Power Research Institute was involved in  
14 doing science to investigate that issue.

15 Q Now, by the way, just so the jury understands  
16 about trade associations, would you agree -- strike  
17 the question.

18 Based on your years of experience as an  
19 economist, is it quite common for a major industry to  
20 have trade associations?

21 A Yes.

22 Q In fact, do most major industries in the  
23 United States today have trade associations?

24 A I would not be surprised to find out that  
25 most did, no. They are very common.

03396

1 Q And there is nothing -- just having a trade  
2 association is not an anti-competitive act, is it,  
3 Doctor?

4 A In and of itself, no, it would not be. It  
5 would depend on what went on within the trade  
6 association.

7 Q Now, do you remember another example of an  
8 industry defending its product -- actually, do you  
9 remember the apple growing industry coming under  
10 attack when a group of environmentalists contended  
11 there is a chemical called Alar, A-l-a-r, that is used  
12 on apples I think to prevent them from dropping off  
13 the tree too soon, and some environmental groups  
14 contended if you eat those apples you might get  
15 cancer?

16 A I remember the concern about Alar, yes.

17 Q And did you remember that at the time the  
18 apple growers, including in this state, got together

19 and started a public relations strategy to defend  
20 apples against what they thought was an unfair attack  
21 on apples?

22 A I was not aware of that, but it would not  
23 surprise me at all.

24 Q That is not uncommon, is it?

25 A I would say -- that would not surprise me.

03397

1 Q So the fact that the cigarette industry got  
2 together to develop a public relations strategy,  
3 particularly if you look at the first paragraph where  
4 it says they are strongly convinced that there is no  
5 sound scientific basis for the charges that have been  
6 made.

7 As an economist, Doctor, has your experience  
8 been if an industry believes that its product is being  
9 unfairly attacked, that is even a greater reason why  
10 they may get together to try to develop a strategy to  
11 address the attack?

12 A I think that it would not be surprising that  
13 an industry that felt it was being unfairly attacked  
14 would want to offer truthful evidence to refute that  
15 charge.

16 Q And so let's see what happened here. At  
17 least in this meeting, according to Hill and Knowlton  
18 -- according to the tobacco industry, at least this is  
19 what the document says they said, the tobacco folks  
20 told Hill and Knowlton -- Hill and Knowlton is a  
21 public relations firm, is that correct?

22 A That is my understanding, yes.

23 Q You have heard of them before this case?

24 A Yes, I probably have.

25 Q So the tobacco people pointed out to Hill and

03398

1 Knowlton, according to this memo, they pointed out  
2 that the National Cancer Institute of the United  
3 States Public Health Administration has refuted the  
4 tie-up between smoke -- cigarette smoking and cancer.  
5 At least that's what the tobacco companies told Hill  
6 and Knowlton, according to this document, is that  
7 correct?

8 A Yes.

9 Q Now, you at least are generally familiar with  
10 the National Cancer Institute, sometimes known as the  
11 NCI, is that correct?

12 A I am now, yes.

13 Q It is an agency of the federal government, is  
14 that correct?

15 A Yes, I believe so.

16 Q In fact, it is the public health agency in  
17 the United States that addresses cancer issues, is  
18 that correct, sir?

19 A I will take your word for that. That  
20 certainly seems plausible.

21 Q Now -- so the question is, was the -- have  
22 you now because of your work on this case to testify  
23 to this jury, did you verify that the tobacco  
24 companies were telling the truth to Hill and Knowlton  
25 that in fact at that point in time the National Cancer

03399

1 Institute had refuted the tie-up between cigarette  
2 smoking and cancer?

3 A No, I didn't look into what the National

4 Cancer Institute's position was.

5 Q Well, let's look at some documents in  
6 evidence to see if we can show that to you. I am  
7 going to now put on the screen Defense Exhibit WG258.  
8 As I start to go through this document for a minute,  
9 let me just ask you a question, Dr. Solow.

10 Do you agree if we are going to try to  
11 understand what happened forty-five years ago at the  
12 Plaza Hotel, that we can't judge what happened  
13 forty-five years ago by what we know today, but in  
14 fairness we need to go back and look at what was known  
15 at the time of the Plaza Hotel meeting? Would you  
16 accept that as a fair statement?

17 A I think what we would need to do -- in terms  
18 of the economics of the issue what we would need to do  
19 is understand what the firms chose to do, whether  
20 their behavior was consistent with competition or  
21 collusion, regardless of what they believed was the  
22 truth about smoking and health.

23 I am not in a position to judge what was  
24 known or what was not known about smoking and health  
25 in the '50s, or for that matter today, the same way

03400

1 that, say, Dr. Henningfield was.

2 From an economic standpoint I want to  
3 understand whether what they did at that time was  
4 consistent with competition or collusion at that time,  
5 and what they do today, whether that is consistent  
6 with competition or collusion today.

7 Q You have pointed at a specific meeting that  
8 occurred at the Plaza Hotel in December of 1953, is  
9 that correct?

10 A That is correct.

11 Q So if we are going to find out whether these  
12 gentlemen from the tobacco companies that met that  
13 day, whether they really believed their product was  
14 unfairly under attack, we need to go back and look at  
15 what the state of knowledge was about smoking and  
16 health at that time, do we not, sir?

17 A As an economist, it is not clear to me why I  
18 need to know whether they felt their product was  
19 fairly attacked or unfairly attacked. As an economist  
20 what I am concerned with is whether the actions they  
21 took as a result of that meeting was consistent with  
22 competition or collusion.

23 They might have felt -- they might well have  
24 felt truly that their product was unfairly being  
25 attacked. As a result of that belief they might well

03401

1 -- in fact, I believe they did, as a result of that  
2 belief they felt they ought to collude on smoking and  
3 health.

4 As an economist, my concern is not with what  
5 they believed or didn't believe about the truth or  
6 falsity of the attack. My concern is with was -- the  
7 decisions they made and their behavior subsequent to  
8 those decisions and from that point on, was that  
9 consistent with collusion or competition.

10 Q As an economist it doesn't matter to you at  
11 all that there was a completely legitimate,  
12 understandable reason why these people got together?  
13 That doesn't play into your judgment at all?

14 MR. FERGUSON: Objection, argumentative and

15 irrelevant.

16 THE COURT: Overruled.

17 THE WITNESS: It seems to me that there are  
18 legitimate reasons to get together, there are  
19 illegitimate reasons to get together. I am willing to  
20 believe that the tobacco executives felt that their  
21 product was unfairly being attacked. Does that mean  
22 as a result of that they necessarily were behaving in  
23 a competitive fashion? I think it is irrelevant to  
24 whether they behaved in a competitive fashion or  
25 collusive fashion, what they thought.

03402

1 It doesn't seem to me to be an excuse to  
2 behave in a collusive fashion that, well, we felt we  
3 were being unfairly attacked and so we decided to  
4 violate the antitrust laws or to collude and agree not  
5 to compete.

6 BY MR. WEBB:

7 Q Doctor, as an economist, if you were going to  
8 analyze at a meeting that happened forty five years  
9 ago, that you were not at -- you were not at this  
10 meeting?

11 A I was not born at that time. I wasn't quite  
12 yet born.

13 Q If we are going to try and analyze what  
14 happened, one of the things we are going to ask  
15 ourselves, aren't we, is does there appear to be a  
16 legitimate reason why these folks got together in the  
17 first place? Isn't that a fair question to ask?

18 A We can ask the question whether there was a  
19 legitimate reason for them to get together. Whether  
20 the answer to that question is material to an economic  
21 analysis of whether their behavior as a result of what  
22 went on with that meeting is consistent with collusion  
23 or competition, I don't believe it is necessarily  
24 relevant.

25 Q Do you see up there at the top actually the

03403

1 author of this article -- I will show you the date of  
2 the article, by the way. The date of the article is  
3 January, 1954. That happens to be the month following  
4 this meeting in December of '53, doesn't it?

5 A That's correct.

6 Q And this is an article published -- it is  
7 called Lung Cancer and the Smoking Habit --

8 A And the Tobacco Smoking Habit.

9 Q -- and the Tobacco Smoking Habit. And the  
10 gentleman that authored this article is W. C. Hueper,  
11 H-u-e-p-e-r, M.D., National Cancer Institute, United  
12 States Public Health Service, Department of Health,  
13 Education and Welfare, Bethesda, Maryland.

14 Do you see that?

15 A I see that, yes.

16 Q I will publish this one paragraph here, the  
17 beginning. Dr. Hueper says, rather far-reaching, if  
18 not extravagant, claims recently have been advanced as  
19 to the important, if not predominant, role which  
20 cigarette smoking is alleged to have played in the  
21 production of lung cancer and its progressive rise and  
22 frequency during the past thirty years.

23 A critical and sober analysis of the evidence  
24 offered in support of these assertions is in order not  
25 only for reasons of scientific accuracy but also for



03404

1 -- what does that say, medical/legal reasons, and  
2 especially for determining the direction of future  
3 epidemiologic research, and of controlled activities  
4 in the field of research.

5 A In the field of lung cancer.

6 Q In the field of lung cancer.

7 Do you see that?

8 A Yes.

9 Q Let's just go to the last page to see what  
10 the conclusion was of this gentleman from the National  
11 Cancer Institute.

12 It may be concluded that the existing  
13 evidence neither proves nor strongly indicates that  
14 tobacco smoking, and especially cigarette smoking,  
15 represents a major, even predominating causal factor  
16 in the production of cancers of the respiratory tract,  
17 and are the main reason for the phenomenal increase of  
18 pulmonary tumors during recent decades.

19 If excessive smoking actually plays a role in  
20 the production of lung cancer, it seems to be a minor  
21 one if judged from the evidence on hand. However, it  
22 may be well to remember in this connection, the  
23 concluding statements of Doll and Kennaway, that the  
24 study of the relation between the national consumption  
25 of tobacco and the national incidence of cancer of the

03405

1 lung has scarcely begun.

2 Do you see that?

3 A Yes.

4 Q At least from this article it would appear  
5 that the tobacco companies told the truth to Hill and  
6 Knowlton when they stated that the National Cancer  
7 Institute had refuted the tie-in at least at that  
8 point in time?

9 MR. FERGUSON: Objection. Relevance.

10 THE COURT: Overruled.

11 THE WITNESS: They certainly didn't do it  
12 based on this article, which was published afterwards.  
13 But I would not be surprised to find that there were  
14 -- that there were either preprints of this article or  
15 similar articles were available prior to December  
16 1953.

17 BY MR. WEBB:

18 Q Let me show you an article before 19- --  
19 before the meeting. Just to show you what the state  
20 of the knowledge was back at that time, I showed you  
21 the one -- by the way, an article published in January  
22 1954 would have been written before January of 1954 in  
23 a medical journal, is that fair to say?

24 A I have no idea what the publication lag in  
25 member journals is. I can tell you what the

03406

1 publication lag in economic journals.

2 Q There is some lag?

3 A In economics, it is way too long.

4 Q Let's look at this article. This is an  
5 article -- it says from the Laboratory of Experimental  
6 Pathology, the University of Texas medical branch,  
7 Galveston, Texas. Presented at the 7th Annual Cancer  
8 Symposium, May 1953, at the M.D. Anderson Hospital For  
9 Cancer Research, Houston.

10 Do you see that, sir?

11 A Yes.  
12 Q Have you come to learn that the M.D. Anderson  
13 Hospital for Cancer Research is one of the major  
14 cancer research facilities in the United States?  
15 A No. I don't doubt it, I just -- I don't keep  
16 track -- I have not kept track of where the major  
17 cancer research institutes in the United States are.  
18 Q Let's see what is being said about smoking  
19 and lung cancer at this time.  
20 This article actually is entitled Smoking and  
21 Cancer of the Lung. Let's Review the Facts.  
22 And they give the names of the two authors.  
23 And I just showed you what it said about them down  
24 there.  
25 Do you see that?

03407

1 A Yes.  
2 Q I just want to show you what the conclusion  
3 was these folks from the scientific community were  
4 saying in May of 1953, which is before the Plaza Hotel  
5 meeting.  
6 A Okay.  
7 Q They did an analysis, and this is their  
8 summary.  
9 In summary, it may be said that in our  
10 opinion the data available today do not justify the  
11 conclusions that the increase in the frequency of  
12 cancer of the lung is the result of cigarette smoking.  
13 The statement that carcinoma of the bronchus has  
14 actually increased in frequency is, in our opinion,  
15 open to question.  
16 Furthermore, adequate studies are not now  
17 available on the frequency of smoking of cig- -- of  
18 cigarette smoking in the population. These factors  
19 would be necessary in establishing a causal  
20 relationship between smoking and cancer of the lung.  
21 Do you see that, sir?  
22 A Yes.  
23 Q Now, looking at that document and the one I  
24 just showed you, does that appear to at least  
25 reinforce in your mind as an economist that this

03408

1 industry legitimately believed at the time they got  
2 together at the Plaza Hotel that they needed to  
3 develop a public relations campaign to beat back what  
4 they at least thought was an attack on their product  
5 that they did not believe was supported by scientific  
6 research?  
7 A That would be part of the strategy, yes.  
8 Q Now, this meeting, if I understand it, is the  
9 meeting -- well, let me make sure -- I don't want to  
10 misstate anything you have said.  
11 Is this the meeting, and is this the document  
12 that evidences the meeting where my client, Philip  
13 Morris, entered into this arrangement that you have  
14 put up here as number one, the arrangement not to  
15 advertise on the basis of health?  
16 That is probably too far away from the jury.  
17 You wrote this chart out, I guess, the day  
18 before yesterday, is that correct?  
19 A I believe so.  
20 Q And this first arrangement -- the arrangement  
21 not to advertise on the basis of health, 1953 Plaza

22 Hotel, am I correct this is the meeting that you say  
23 Philip Morris agreed to enter into this arrangement?

24 A I will again characterize my testimony as  
25 saying I think the genesis of that arrangement, the  
03409

1 seed of that arrangement was sewn at this meeting.  
2 Exactly when an agreement was reached, I can't date it  
3 to a particular day. But the seed was sewn at this  
4 meeting.

5 Q What I would like you to do -- maybe I should  
6 give you a copy of the document. I am going to ask  
7 you a question and you tell me. What I would like to  
8 know from you is for you to show me where in this  
9 document that is marked as State Exhibit number 17 --  
10 what I would like to ask you, I want you to show me --  
11 and then if you show me I will put it on the screen  
12 for the jury.

13 Show me where on that document that Philip  
14 Morris said or did anything that indicated to you that  
15 they were becoming involved in or had become involved  
16 in this arrangement to not advertise on the basis of  
17 health. Show me where it is in that document.

18 A I don't believe it says explicitly those  
19 words. When firms engage in agreements of this type,  
20 and it was the type that I had described, and it is  
21 clear from the document that the firms had this  
22 concern, they were concerned about the  
23 anti-competitive and antitrust aspects of doing this.  
24 And so typically when one is involved in a collusive  
25 arrangement, it would be very unlikely I think as a

03410  
1 matter of economics to expect firms to write out a  
2 collusive agreement. That would be a very powerful  
3 document to show in an antitrust case. So I think it  
4 is unlikely to find anywhere that it is written down  
5 that we, the undersigned CEOs of the tobacco industry,  
6 agree to do the following anti-competitive things.

7 From this document which -- and the  
8 subsequent Hill and Knowlton document, which I keep  
9 mentioning, and then the behavior of the industry over  
10 time and the other documents, I am inferring that the  
11 firms had an agreement. Some of the other documents  
12 state specifically things about gentlemen's agreements  
13 and long-standing agreements --

14 Q Wait a minute. You said that is agreement 3  
15 and 4, you told us this morning?

16 A No, I believe there are documents that say  
17 there are agreements -- industry agreements not to  
18 advertise on the basis of health as well. Certainly  
19 their behavior is consistent with having an agreement  
20 not to advertise on the basis of health.

21 Q I want to go through --

22 A Certainly at this time when this meeting took  
23 place they were busily advertising on the basis of  
24 health and shortly thereafter they stopped doing it,  
25 which is consistent with them having agreed to do

03411

1 that.

2 And if you read the second Hill and Knowlton  
3 document and the list of things to do it involves --  
4 things to do, included things like, let's stop  
5 advertising with doctors, no more  
6 play-it-safe-with-Luckys and that sort of thing.

7 I cannot point you to a place where the  
8 executives signed a document, a contract where they  
9 said we agree to do the following things.

10 Q Nor did I ask you, did I, Doctor?

11 A I thought you asked me to tell you where in  
12 this document that existed. I don't think --

13 MR. FERGUSON: Objection, your Honor. Can we  
14 proceed with a question and answer without  
15 interrupting so I can phrase an objection?

16 THE COURT: I think we are ready for another  
17 question.

18 MR. WEBB: I was going to just do that.

19 BY MR. WEBB:

20 Q Doctor, I think my question is very simple.  
21 I put the document in your hand. You are the one that  
22 wrote on this chart for this jury, and you just told  
23 me my client did something in this meeting, did  
24 something in this meeting, that indicated to you that  
25 either it was going to join an agreement or was about  
03412

1 to join an agreement or did join in an agreement. I  
2 am giving you the most open-ended question I can. You  
3 -- show me something in the document that tells you  
4 anything that Philip Morris said or did that indicates  
5 that to you?

6 A Well, here is something that is certainly  
7 consistent with that on page 3.

8 Q I will go to page 3 with the jury then. I  
9 will go to page 3 and mark wherever you tell me to  
10 mark. We are on page 3?

11 A Do the companies consider -- do you see that  
12 right in the middle?

13 Q Where are we?

14 A You have gone past it. Back up. Back up.  
15 Right there. Right in the middle. You have it right  
16 there. Do the companies consider that their own  
17 advertising and competitive practices have been a  
18 principal factor in creating a health problem?

19 Answer: The companies voluntarily admitted  
20 -- sorry, voluntarily admitted this to be the case  
21 even before the question was asked. They have  
22 informally talked over the problem and will try to do  
23 something about it. They do, however, point out that  
24 this is the one important public relations activity  
25 which might very clearly fall within the purview of  
03413

1 the antitrust act. Accordingly, it is doubtful that  
2 we will be able to make any formal recommendation with  
3 regard to advertising or selling practices and claims.

4 Q Okay. Let's take that language and talk  
5 about that language, because -- and we will go on to  
6 other language if you want. But let's stick with this  
7 since you have pointed this out to the jury.

8 Do I understand your testimony that from that  
9 language -- by the way, does this language indicate  
10 that Philip Morris said or did anything that would  
11 indicate that it was entering into some agreement not  
12 to compete on health?

13 A It said the companies -- it says the  
14 companies, and Philip Morris was a company. It  
15 doesn't say the companies other than Philip Morris, it  
16 says the companies admitted this was a problem. It  
17 said they, it didn't say they, except for Philip

18 Morris, it said they have informally talked over the  
19 problem and will try to do something about it.

20 Q Okay. Just so I understand, because they  
21 said that they are going to try to do something about  
22 it, what -- I just want to make sure -- are you  
23 inferring from that that they actually agreed to never  
24 again compete on health as you set forth in paragraph  
25 1 here?

03414

1 A Not from that alone, no. From the entire  
2 body of evidence that I have seen in the case, all the  
3 other documents, the fact that the health advertising  
4 changed, disappeared, various other statements about  
5 how they were going to compete, the entire body of  
6 documents that leads me to that direction. Not simply  
7 that statement alone.

8 But that is certainly consistent with the  
9 notion that at this meeting the companies were -- were  
10 in the process of agreeing to do what I think they  
11 actually agreed to do.

12 Q They actually go on to say, they point out  
13 that this is the one important public relations  
14 activity that might very clearly fall within the  
15 purview of the antitrust act.

16 Do you see that?

17 A Yes.

18 Q Let me just ask you, out of fairness to the  
19 people back at that time, do you have any reason to  
20 believe that they didn't go back and talk to their  
21 lawyers and decide that they couldn't enter into this  
22 kind of agreement because it would violate the  
23 antitrust laws?

24 MR. FERGUSON: Objection. Speculative.  
25 Legal conclusion.

03415

1 THE COURT: Overruled.

2 THE WITNESS: That would not surprise me that  
3 they would be concerned about the possibility of  
4 violating the antitrust laws. And that's why it seems  
5 to me that Hill and Knowlton viewed it was unlikely  
6 they would make any formal recommendation with regard  
7 to advertising or selling practices, because a formal  
8 agreement would, I think -- writing it down on paper  
9 might well have been recognized as something illegal.

10 You have to remember that only fourteen years  
11 ago these same firms had been convicted of price  
12 fixing.

13 BY MR. WEBB:

14 Q And they were sensitive about not violating  
15 the antitrust laws, were they not?

16 A They knew -- they knew -- I would imagine  
17 they knew it was something they could get into trouble  
18 for.

19 Q Well, actually I think you told the jury  
20 yesterday that they actually cleared having this  
21 meeting with the antitrust division?

22 A No. I think that is a mischaracterization of  
23 what I said.

24 Q What did you say?

25 A I think what I said is they went to the

03416

1 Department of Justice and asked whether it would be  
2 all right to have this kind of meeting, and were told

3 you can do whatever you want so long as you don't  
4 break the law.

5 Q Doctor, would you at least agree that if an  
6 industry actually goes to the antitrust division of  
7 the Department of Justice to front off and to tell  
8 them that we are thinking about having a meeting, that  
9 at least that shows that they are concerned about --  
10 they were trying to make sure they don't violate the  
11 antitrust laws? Why else would they go to the  
12 Department of Justice?

13 A It is worth asking. And you see what the  
14 justice department will say. To my mind, again, I am  
15 not a lawyer, but to my mind it is not surprising what  
16 the justice department would do is say, you are free  
17 to do whatever you want so long as you don't break the  
18 law, and if you break the law we are going to come  
19 after you.

20 Q I am asking from --

21 A And at that point, having received that piece  
22 of information the firms would agree -- would decide  
23 what they wanted to do.

24 Q I'm sorry. Just the fact -- it is not every  
25 day of the week that companies go to the Department of

03417

1 Justice and say, we are about ready to have a certain  
2 kind of meeting and we want to talk to you about it  
3 before we have the meeting. Doesn't that show some  
4 sensitivity on behalf of the industry to try to make  
5 sure they don't violate the antitrust laws?

6 A I think it shows some sensitivity to the  
7 antitrust factor. What they choose to do after having  
8 that discussion with the justice department will be  
9 what it will be.

10 Q By the way, most people who are going to go  
11 out and commit a crime don't go into the department --  
12 tell the justice department about it ahead of time, do  
13 they?

14 A No.

15 Q Now, is it your position after this meeting  
16 somehow there is some evidence that there was some  
17 formal -- formal recommendation -- you think there was  
18 a formal agreement entered into later?

19 A I think there was an agreement entered into  
20 later. I would be very surprised to find that it had  
21 been written down as a formal agreement, that is a  
22 document -- I have said this before, I think it would  
23 be very unlikely to find a document which would say,  
24 this is what we agree to do, we agree not to compete  
25 on the basis of safety and health, we agree not to

03418

1 advertise. The reason for that is that those things  
2 -- those agreements are likely to be illegal.

3 Again, I will leave it to the lawyers to give  
4 the official version of that. I won't offer the legal  
5 conclusion. But generally speaking, I think it would  
6 be very surprising to see -- firms conspiring to  
7 violate the antitrust laws writes those things down.

8 Q I am not asking about some informal agreement  
9 signed. I am just trying to find out what it is --  
10 since you -- you are the one that wrote it down, that  
11 this happened at the Plaza Hotel, I am trying to make  
12 sure the jury understands what is it you had in front  
13 of you that led you to write that on this chart here,

14 and bear with me, have you showed us this language  
15 here, so we have seen this.  
16 Is there some other language that you want  
17 the jury to look at in the documents you have in front  
18 of you?  
19 A Let me start by repeating --  
20 Q Doctor, I just asked you a question. I am  
21 talking about one specific document.  
22 A Then if you will give me a minute I will look  
23 back over the document and see if there is anything  
24 else.  
25 Q Thank you.

03419

1 A No.  
2 Q Now, I will set that aside then, because --  
3 you then just told the jury a moment ago that there  
4 was some other Hill and Knowlton document, though,  
5 that you wanted to show them, because you believe it  
6 supports why you wrote on this chart that this  
7 arrangement was entered into at this Plaza Hotel.  
8 What document is that?  
9 A I'm not sure I could give you the title of it  
10 as I sit here. There was a subsequent -- this  
11 document says they were going to go talk to the  
12 scientific people and perhaps talk -- interview the  
13 advertising people. And I believe that they  
14 subsequently did.  
15 And there is another document, and I don't  
16 know how to identify it for you. The jury has already  
17 seen it. It is the one that had the things to do list  
18 at the end of it. And perhaps you can help me find  
19 the one I am talking about.  
20 Q I will try to. In order to decide if Philip  
21 Morris entered into an agreement or an arrangement, is  
22 there any other Hill and Knowlton document where  
23 Philip Morris is present for a meeting, where Philip  
24 Morris did anything or said anything that led to you  
25 conclude that they were involved in this arrangement,

03420

1 this thing that you mark as number one on your chart?  
2 A Another document?  
3 Q I am talking -- another -- we are talking  
4 about Hill and Knowlton now. And we are going to move  
5 on later, but let's stick with Hill and Knowlton. You  
6 established that Philip Morris was at this meeting?  
7 A Yes.  
8 Q Okay. Was there any other meeting with Hill  
9 and Knowlton that Philip Morris is present at in which  
10 Philip Morris said or did anything that led you to  
11 believe they had entered into this arrangement?  
12 A So certainly. I mean, for example, the  
13 meeting between the lawyers at the cigarette  
14 advertising code -- actually it was a meeting at the  
15 Tobacco Institute, for example, where the lawyers of  
16 the various firms reached a compromise about how  
17 Lorillard was going to advertise Kent cigarettes,  
18 whether they would be allowed to use micronite or the  
19 word filter on their packaging.  
20 That's a meeting at which a lawyer  
21 representing Philip Morris was present at which the  
22 companies clearly were discussing among themselves  
23 what sort of advertising Lorillard would do. That's  
24 another example.

25 Q I'm sorry. It's my fault, my question. This  
03421  
1 was a meeting -- I am talking about back in December.  
2 We are in December. Do you see that, December 15,  
3 1953?

4 A Yes.

5 Q Hill and Knowlton talking about public  
6 relations?

7 A Yes.

8 Q This document here?

9 A Yes.

10 Q Philip Morris is at this meeting?

11 A Yes.

12 Q Is Philip Morris at any other meetings with  
13 Hill and Knowlton, the next day or the day after or  
14 four days later, in which Philip Morris did anything  
15 or said anything that led you to believe that they  
16 were entering into this conspiracy or this arrangement  
17 -- in connection with the Plaza Hotel meeting in 1953?

18 A I'm sorry. I misunderstood your question. I  
19 thought you asked me whether there were any other  
20 meeting ever at which Philip Morris was present where  
21 that agreement was discussed or implemented.

22 Q We will get to the Lorillard meeting. We  
23 will go through this very slowly, Doctor. We are  
24 still back in December of 1953?

25 A I'm sorry. I misunderstood your question.

03422

1 Q That's okay.

2 A I am not aware of another meeting besides  
3 this one. And there is the one other Hill and  
4 Knowlton document, at which point Hill and Knowlton is  
5 beginning to be at the center of this cartel.

6 Q Well --

7 A So the answer is no, I don't know that they  
8 met on the next day, for example.

9 Q Let me show you a document that the State has  
10 marked as State Exhibit 162 which appears to be a  
11 meeting thirteen days later, but I am going to see if  
12 you have seen this and maybe help you refresh your  
13 memory. Because I think Philip Morris is at this  
14 meeting according to this document. This document is  
15 a little hard to read up there, but if we get in on it  
16 you will see that date up there is the 28th of  
17 December, 1953. Do you see that?

18 A Yes.

19 Q Have you actually seen this document?

20 A -- it might help --

21 Q Let's go back and look at that time.

22 A If you could --

23 Q I will make a -- give you a copy. I will  
24 give you the document itself.

25 I will hand the witness what is in evidence

03423

1 as State Exhibit 162.

2 A Okay. I believe I have seen this before. I  
3 can't recall as I sit here.

4 MR. FERGUSON: Your Honor, I have a point of  
5 inquiry. We can't find that this document has been  
6 admitted or designated.

7 MR. WEBB: It actually, I thought, was  
8 designated -- I think this is in evidence.

9 MR. FERGUSON: It may be, Counsel, I just



10 can't find it. I just want to verify.  
11 MR. WEBB: I will try to verify. My notes  
12 say it is in evidence. If I made a mistake, I will  
13 correct it obviously.  
14 THE COURT: Our records indicate that it is  
15 not yet admitted.  
16 MR. WEBB: I made a mistake then, your Honor.  
17 I will offer the document into evidence.  
18 THE COURT: 162, did you say?  
19 MR. WEBB: It is 162. I'm sorry, your Honor.  
20 MR. FERGUSON: This is a Defendant's exhibit.  
21 MR. LEITER: I think it is WX162. And our  
22 records indicate it has been admitted.  
23 THE COURT: I was looking under the wrong  
24 number.  
25 MR. WEBB: As you would, since I obviously

03424

1 misspoke.  
2 THE COURT: That has been admitted.  
3 MR. WEBB: And I will correct the record.  
4 BY MR. WEBB:  
5 Q Doctor, I indicated this is a State Exhibit.  
6 I saw the WX and thought it was Washington. That was  
7 my mistake. This is an exhibit that is marked by the  
8 defense. It is called Defense Exhibit -- WX162.  
9 A Okay.  
10 Q You told me now that you have had a chance to  
11 look at -- you have seen this document to prepare for  
12 your testimony?  
13 A I may have, I may not. I can't recall at  
14 this moment. It seems familiar, but I'm not positive.  
15 Q Because this appears to be another meeting  
16 talking about the -- this is actually at the Plaza  
17 Hotel, do you see that?  
18 A Yes. That's what makes me think perhaps I  
19 haven't seen it before.  
20 Q So you think maybe the State did not show you  
21 this document?  
22 A I'm not sure I have seen this document.  
23 Q This is just thirteen days later. It is a  
24 second meeting at the Plaza Hotel. It looks like the  
25 same people are present. Does that look to you like

03425

1 the same people that were present that were there  
2 thirteen days earlier?  
3 A Yes.  
4 Q Now, in this document, they go through and  
5 talk about this program they are developing to create  
6 -- this thing called the Tobacco Industry Research  
7 Committee. Do you see that?  
8 A Yes.  
9 Q And the document goes on to talk about  
10 essentially how that program is going to operate, is  
11 that correct?  
12 A At least as it was envisioned in this  
13 document, that's correct.  
14 Q Okay. And it goes on, for example, to -- I  
15 won't go through it in detail, we can stop any time  
16 you want to. It goes on to explain just what kind of  
17 public statement the industry is going to make when it  
18 creates the TIRC, is that correct?  
19 A That's correct.  
20 Q And then that's the topic that is discussed.

21 And then they go on and talk about financial matters.  
22 Do you see that?

23 A Yes.

24 Q They talk about a public opinion poll?

25 A Yes.

03426

1 Q They talk about a white paper?

2 A Or not a white paper, apparently.

3 Q Or not a white paper?

4 A It is headed a white paper and that

5 suggests --

6 Q They are going to do it?

7 A Yes.

8 Q And then goes on to talk about advertising  
9 agencies?

10 A Yes.

11 Q And then on the next page it actually talks  
12 about additional members. It says present members  
13 will approach Liggett & Myers, do you see that?

14 A Yes.

15 Q Other suggestions that they should consider,  
16 do you see that?

17 A Yes.

18 Q My question to you, Doctor, is because we are  
19 talking about this issue of whether there is evidence  
20 of Philip Morris entering into any arrangement that  
21 you have put forth here on the Plaza Hotel, in this  
22 next meeting at the Plaza Hotel do you see -- just so  
23 I know, is there anything discussed at that  
24 meeting that would indicate to you that Philip Morris  
25 was agreeing to join in this arrangement?

03427

1 A Not in this document, no.

2 Q Now that I have showed you this, are you  
3 aware of any other meetings at the Plaza Hotel that  
4 Philip Morris attended with Hill and Knowlton  
5 representatives in December of 1953 or January of  
6 1954, any time in that time period?

7 A No.

8 Q Thank you. You just told the jury a moment  
9 ago -- you indicated -- I don't want to misphrase it  
10 -- maybe I can just ask it this way.

11 You told me this morning that you couldn't  
12 tell me when Philip Morris actually entered this  
13 arrangement, but at least it was by June of 1954? Did  
14 I say that correctly?

15 A I believe by June of 1954 the agreement to  
16 sees advertising on the basis of health was pretty  
17 much in place, yes.

18 Q What is it that Philip Morris did between  
19 December and June that has caused to you reach that  
20 definitive conclusion as an expert witness in this  
21 case?

22 A The nature of -- commentators on advertising  
23 practices at the time noted, and we have looked at  
24 some of the ads, that the health scare advertising was  
25 pretty much done by June of '54. For example, the

03428

1 business press noted that there had been a significant  
2 change in the nature of advertising, that the health  
3 scare advertising was over.

4 That was one of the things that was on the  
5 list of things to do in the second Hill and Knowlton

6 document which we haven't looked at.

7 Q I don't want to keep you from looking at any  
8 document you want to look at. What is that document?  
9 And I will show it to you.

10 A Again, I don't know how to identify it any  
11 better than -- it is the one that has the list of  
12 things to do attached to the -- the jury has already  
13 seen it, I believe.

14 Q Does -- just so I understand, is this a  
15 document that says that Philip Morris did something or  
16 said something, that showed you they entered into this  
17 agreement?

18 That's what I am trying to find out, sir.

19 A What I am saying is that document is -- as I  
20 understand it, it is Hill and Knowlton's view of how  
21 the upcoming campaign is going to go and some things  
22 that need to be done. It is the one where they say in  
23 this of all -- I am going to paraphrase, I won't get  
24 it exactly right. But they say in this crisis the old  
25 notion of competition on the basis of ideas should be  
03429

1 suspended or something like that. I'm sorry. I don't  
2 have the number for you, and I can't give you a name  
3 for it.

4 Q Is this a document reflecting a meeting with  
5 Philip Morris?

6 A I believe there were communications between  
7 Hill and Knowlton and Philip Morris and the other  
8 companies. It is subsequent to the first meeting.  
9 And these are some things that they are going to do,  
10 and following that things happened, things were done.

11 Q I am going to show you a document, because I  
12 don't -- I want to give you a chance to tell the jury  
13 anything that my client said or did that has indicated  
14 to you that you have reached this conclusion. I don't  
15 know if this is the document, but I will show you a  
16 document that marked State Exhibit 5813.

17 I have marked -- I believe Mr. Ferguson  
18 showed you this document. But I don't want to  
19 misrepresent that, so I will ask you to look at it.

20 Is that the document you are talking about?

21 A Yes. I'm sorry. And the title is Forwarding  
22 Memorandum. And I could not recall that.

23 Q Okay. Now that I have handed you the right  
24 document, I want you to show the jury any paragraph in  
25 that document that indicates to you that Philip Morris  
03430

1 said something or did something to join in this  
2 arrangement that is in paragraph 1.

3 MR. FERGUSON: Your Honor, this exhibit  
4 exists in two forms. The other one is 5341 and  
5 the 5341 version consists of more pages.

6 MR. WEBB: I will use your exhibit. If you  
7 have it, I will use it. I am going to use your  
8 exhibit.

9 THE COURT: Are these documents identical in  
10 other respects?

11 MR. FERGUSON: Except for the additional  
12 pages they are both admitted, your Honor.

13 THE COURT: Is there any reason not to  
14 withdraw 5813 and leave only 5341 in evidence?

15 MR. FERGUSON: That would be acceptable to  
16 the State.

17 MR. WEBB: That's fine, Judge.  
18 THE COURT: 5813 then is withdrawn.  
19 (Exhibit 5813 was withdrawn.)

20 BY MR. WEBB:

21 Q Do you have my question in mind, sir?

22 A Yes, I believe I do.

23 Q My question -- this document -- let's start  
24 -- you can look all through the document. Is this a  
25 document that reflects a meeting that Philip Morris is

03431

1 at?

2 A This is a document that reflects discussion  
3 by Hill and Knowlton with the people from the various  
4 companies, as I understand. So Hill and Knowlton is  
5 beginning to be at the center of this conspiracy.  
6 They are the conduit by which agreements are reached  
7 at this point.

8 Q Just show me in the document, where does it  
9 say that someone talked to Philip Morris in this  
10 document?

11 A They don't actually mention the names of  
12 particular companies. I am -- they say, this is of  
13 course the most challenging problem our organization  
14 has ever faced, and perhaps the most challenging  
15 problem that has ever faced a great industry, one with  
16 annual sales of almost 5 billion retail and with  
17 economic roots that reach clear back to the farm.

18 And they talk about the attitude of the men  
19 we must directly deal with in the industry, how these  
20 men feel. They don't mention the particular -- they  
21 talk about the interviews with the four research  
22 directors. They don't mention the names of the  
23 particular companies in this document.

24 Q Okay. But is there -- let's go on. Is there  
25 something -- you are not going to infer Philip Morris

03432

1 into this arrangement, are you? You are going to want  
2 to see actual evidence, aren't you?

3 A I think I am going to infer Philip Morris's  
4 behavior -- I am going to look at evidence of their  
5 behavior --

6 Q Afterwards?

7 A -- and to ask whether that was consistent with  
8 competition or consistent with collusion. If I had a  
9 document that said explicitly Philip Morris agrees to  
10 the following collusive arrangements, I certainly  
11 would have told you about that.

12 Q We are going to go to conduct in a minute.  
13 But I don't want to leave this document. Is there  
14 something in this document that you want the jury to  
15 see that shows you that Philip Morris, my client  
16 Philip Morris entered into this arrangement that you  
17 have put down here as number 1 on this chart?

18 A I would say that there is a list of things to  
19 do --

20 Q What page are you on, sir?

21 A I guess it is -- the next to the last one.  
22 It has a handwritten 8.

23 Q I will put it up on the screen for the jury.

24 A The page number of this -- it seems every  
25 page is numbered 2. I'm sorry, it seems that every

03433

1 page in this document in the upper right-hand corner

2 is numbered 2.  
3 Now, we get to 3 on the -- the last two are  
4 numbered 3, and then it goes 4. To me it is the next  
5 to last page that I have.  
6 Q What is the heading on it?  
7 A Some things to do.  
8 Q I think I have that. I hope these documents  
9 are the same. Is this the page?  
10 A That's what it looks like.  
11 Q Is this it?  
12 A That's what it looks like. That's it.  
13 Q So you believe -- is there something on this  
14 page that shows that Philip Morris said something or  
15 did something that indicated they had joined in this  
16 arrangement?  
17 A As I said before, Philip Morris itself is not  
18 mentioned by name in this document, although Hill and  
19 Knowlton has just had a meeting, as I understand it,  
20 as the other documents show with the chief executives  
21 -- the presidents of all the companies, including  
22 Philip Morris.  
23 Q That's the document we just looked at.  
24 A At that meeting they said they -- Hill and  
25 Knowlton said they intended to speak to the research

03434

1 directors. In this document they report on what  
2 happened when they spoke to the research directors. I  
3 am inferring from that -- I do not have -- there is  
4 nothing in this document that says, we spoke to Philip  
5 Morris specifically, and then the document lays out  
6 the sort of collusive agreement that I believe the  
7 firms actually entered into, and I infer that from  
8 their behavior.  
9 Q Let's look -- I want to make sure the jury  
10 sees the language you are talking about. What are you  
11 talking about?  
12 A For example, decide whether --  
13 Q Which one are you reading now?  
14 A I'm sorry. Number 5.  
15 Q Is that the one I have highlighted there? I  
16 guess I have that right.  
17 A You have that one right.  
18 Decide whether we suggest company publicity  
19 or advertising, consider what the chief points in such  
20 messages should be, decide how this advertising could  
21 be coordinated so that it doesn't bog down A, that's  
22 the way it reads, it probably should be NA,  
23 competitive dogfight. Decide what any one company  
24 could say that couldn't be said by all companies  
25 jointly when they honestly face a problem of human

03435

1 import where competition has no place.  
2 Q Okay -- go ahead.  
3 A That would be one place.  
4 Q Let's stop there and we will go on. Let's  
5 stop here. If I understand, these are the words --  
6 these are not the words of Philip Morris, are they?  
7 A Not --  
8 Q This is a statement by some gentleman at Hill  
9 and Knowlton?  
10 A That's correct.  
11 Q And Hill and Knowlton is setting forth that  
12 these are issues that should be decided, as opposed to

13 issues that have already been decided?  
14 A That's correct.  
15 Q So -- Doctor, you are not going to tell me  
16 that this language led you to conclude that my client  
17 entered into some antitrust -- entered into some  
18 agreement, this arrangement here, are you?  
19 A Not all by itself, no.  
20 Q Well, because this language here doesn't say  
21 Philip Morris agreed to say or do anything?  
22 A Not by itself, no.  
23 Q What else do you have in the document?  
24 A How about number 9?  
25 Q I have that, too, I think. Let's look at

03436

1 number 9.  
2 A Develop some understanding --  
3 Q Hold on, I need to get it so the jury can see  
4 it.  
5 A I'm sorry.  
6 Develop some understanding with companies  
7 that, on this problem, none is going to seek a  
8 competitive advantage by inferring to its public that  
9 its product is less risky than others. No claims that  
10 special filters or toasting --  
11 Q Let me turn over to the other page so the  
12 jury can see it?  
13 A Or expert selection of tobacco, or extra  
14 length in the butt or anything else -- excuse me,  
15 makes a given brand less likely to cause you know  
16 what. No play-safe-with-Luckys idea or with Camels or  
17 with anything else.  
18 Q Now, let's go back. This document here --  
19 again, this document, this is a statement by -- this  
20 is not a statement by Philip Morris, is it?  
21 A No.  
22 Q This is a statement by Hill and Knowlton that  
23 they want to develop this understanding?  
24 A Yes.  
25 Q That's what it says, anyway?

03437

1 A Yes.  
2 Q You are not going to take that statement to  
3 conclude that my client actually entered into that  
4 understanding, are you?  
5 A Not by itself, no.  
6 Q Okay. Let's go on. What is next then? Is  
7 it conduct that occurred? What happens after this?  
8 A After this the health scare --  
9 Q As far as my client is concerned. My client  
10 Philip Morris. What did Philip Morris do or say after  
11 this -- at these Hill and Knowlton meetings that led  
12 you to conclude that they had entered into some  
13 arrangement not to compete on health claims?  
14 A Well, for example there was the change in  
15 advertising, as I said, that the business press noted,  
16 that we went from a time when the advertising was  
17 smoke this cigarette it is better for you, it is  
18 healthier for you, and so forth, to a time, quite  
19 shortly thereafter, where the advertising said, it  
20 tastes better.  
21 We have the meeting at the Tobacco Institute  
22 at which the industry representatives, including I  
23 believe Philip Morris's representative was present --

24 Q Where?  
25 A At the Tobacco Institute. At which it was

03438

1 debated how Lorillard should advertise the Kent  
2 cigarette --

3 Q I'm sorry. That's twelve years later.  
4 That's 19- -- is that 1966?

5 A I believe so. It was a long-lasting  
6 conspiracy.

7 Q Well, we will get there. We are now in  
8 December of 1953, and you said within the next six  
9 months, up until June -- let me go back. I thought  
10 you told me that something happened between December  
11 of 1953 and June of 1954 that convinced you by Philip  
12 Morris's conduct that they had joined the arrangement?

13 A I think what I said was by June of 1954 I  
14 think the conspiracy was in effect, that, as I said,  
15 trade press indicated at the time, and other observers  
16 of the industry noted -- have noted that by June of  
17 1954, before the Federal Trade Commission was  
18 involved, before anything else, the health scare went  
19 away, the health scare advertising stopped, as had  
20 been noted.

21 Q You keep saying the industry. You understand  
22 I represent Philip Morris?

23 A I do.

24 Q Tell me what it is that Philip Morris did or  
25 said, just between December of 1953 and June of 1954,

03439

1 that indicated to you that they had joined this  
2 arrangement? Please answer that question, sir.

3 A For Philip Morris, specifically? I would  
4 have to go look at the particular advertising and see  
5 if Philip Morris's advertisements had changed in that  
6 time period, too. And I said the trade press said,  
7 generally speaking, the health scare advertising had  
8 ended.

9 Q So -- do you see any evidence Philip Morris  
10 changed something?

11 A As I sit here now, I can't think of which  
12 particular advertisements different companies ran. We  
13 had a series of them for the jury before, and we  
14 showed the before and the after.

15 Q We are going to look at those ads. Your  
16 Honor, would this be an appropriate time or we can go  
17 on if you would like?

18 THE COURT: This is fine. We will take a  
19 break.

20 (At this time a short break was taken.)

21 THE COURT: Please sit down.

22 BY MR. WEBB:

23 Q Can you hear me okay, Doctor?

24 A I can.

25 Q One of my colleagues asked me -- I forgot to

03440

1 ask you a question.

2 When you had this document that is marked as  
3 State Exhibit 5341, this is the Hill and Knowlton --  
4 this is the planning meeting, this is the document  
5 that had the things to do.

6 Are you with me?

7 A Yes.

8 Q If we look at that things to do list, right

9 above as you start to list the things to do, the  
10 author -- this is a Hill and Knowlton document, that  
11 is prepared by someone at Hill and Knowlton, is that  
12 correct?

13 A That is my understanding.

14 Q And the author of the document said, as far  
15 as these things to do, the items on this page comprise  
16 quick suggestions by various members of the  
17 organization, starting with Mr. Goss.

18 Mr. Goss is a Hill and Knowlton senior  
19 employee who was at the Plaza Hotel meeting, is that  
20 correct?

21 A That is my understanding.

22 Q These are quick suggestions coming from the  
23 Hill and Knowlton organization, not from the tobacco  
24 companies? That's what it says?

25 A As a result of their discussion with various

03441

1 research people and the presidents of the companies,  
2 yes.

3 Q It says these are quick suggestions from the  
4 members of the -- the organization means Hill and  
5 Knowlton, does it not?

6 A I believe so. You have to take that in the  
7 context of the discussions they had had, but that is  
8 correct.

9 Q Thank you.

10 Now, we want to move beyond December of 1953.  
11 And -- Doctor, you have told us several times that you  
12 believe that the members of the tobacco industry  
13 engaged in certain conduct after the Plaza Hotel  
14 meeting that you believed is consistent with  
15 anti-competitive conduct, that is, not advertising  
16 health claims, is that correct?

17 A And when somebody did advertise a health  
18 claim, other companies would reprimand them and draw  
19 them back in and so forth.

20 Q Let's see what happened. I mean, we are now  
21 going to talk about what the conduct of the tobacco  
22 company was, okay?

23 A Okay.

24 Q This -- number 1, when you wrote this on the  
25 chart, the arrangement not to advertise on the basis

03442

1 of health, just so I understand, is it your theory or  
2 contention that at the Plaza Hotel meeting that the  
3 actual agreement that was reached there, or sometime  
4 thereafter, was that the tobacco companies would never  
5 advertise health claims?

6 A I think they wanted to resist competing on  
7 the basis of making -- of advertising health claims.  
8 I think that they didn't succeed in doing that, in  
9 totally eliminating that. But I think that was the  
10 purpose of the agreement.

11 Q They agreed to have no advertisements that  
12 alluded to health?

13 A I think they wanted to suppress competition  
14 on the basis of health advertising claims. How  
15 narrowly you want to define it -- it depends to a  
16 large extent how you want to define a health claim,  
17 which has always been a little bit of a puzzle to me.

18 At one point the claim was made, again at the  
19 Tobacco Institute, that using the word filter



20 constituted a health claim in the minds of some people  
21 in the industry. I think as a general matter they  
22 wanted to suppress -- not to take advantage -- let me  
23 use the language of the document again.

24 Q This is the Hill --

25 A This is the Hill and Knowlton document, yes.

03443

1 Q Do you have any words of the tobacco company  
2 executives?

3 A I will just stick with the Hill and Knowlton  
4 document. None -- presumably that is not Hill and  
5 Knowlton who is not going to seek a competitive  
6 advantage by inferring to its public, it is presumably  
7 not Hill and Knowlton's public, it is the companies, I  
8 think it is reasonable to surmise. So no one is going  
9 to seek a competitive advantage by inferring to its  
10 public that its product is less risky than others, and  
11 so on about no claims that special filters, et cetera,  
12 I take that to be the tobacco industry, their  
13 products, not Hill and Knowlton and its products.

14 Q That document shows what Hill and Knowlton is  
15 going to suggest to the tobacco companies?

16 A I believe the tobacco companies by and large  
17 agreed to that suggestion, and their subsequent  
18 behavior is consistent with that, yes.

19 Q All I am asking is, did they agree to make no  
20 health claims in their advertising?

21 A I think they agreed to try not to make health  
22 claims in their advertisements, yes.

23 Q Thank you.

24 Let's see what they did. Now, the Plaza  
25 Hotel, that is December 1953, correct?

03444

1 A That's correct.

2 Q Now, let's go -- you have told the jury that  
3 you have seen evidence of the change in the type of  
4 advertisements that the tobacco companies used?

5 A And other commentators and the  
6 contemporaneous business press, yes.

7 Q You are the one that is the expert in this  
8 case, what are you relying on to conclude that they  
9 stopped making health claims?

10 A I have seen copies of the ads before and  
11 after, around this time. I have also read the  
12 contemporaneous business press that noted -- they  
13 noted this change, and other commentators, other  
14 economists who have also noted that change.

15 Q If there was a change, then, is the issue  
16 that this jury has to decide is why there was a  
17 change?

18 A I think the jury has to decide whether this  
19 change is consistent with competition -- this change  
20 and the other things that went on in the industry, not  
21 just in 1953, but to this day, whether those things  
22 are consistent with a collusive agreement among the  
23 firms or whether that is consistent with firms acting  
24 in their own independent self-interest and competing  
25 on the basis of product safety.

03445

1 Q Okay. But I guess -- you are making an  
2 inference or concluding that -- strike the question.

3 You -- have seen what you view to be a change  
4 in health claims after the Plaza Hotel meeting, is

5 that correct, to start with?  
6 A Among other things, yes.  
7 Q And I am talking about that thing right now.  
8 I will move on to other things. Are you focused on  
9 that thing, the change in health claims?  
10 A That is one of the pieces of this puzzle,  
11 yes.  
12 Q As far as that piece, you saw a change -- did  
13 you then conclude that the reason for the change is  
14 because of a collusive agreement?  
15 A I think the change is consistent with a  
16 collusive agreement. And between the documents that  
17 discuss the meetings that were held and the things  
18 that people suggested should be done, and that change  
19 in 1953 and other things that firms, including Philip  
20 Morris, did over the subsequent forty years, that  
21 those things altogether -- they fit together as a  
22 puzzle -- a puzzle that is missing some pieces, to be  
23 certain, but given the pieces of puzzle we have, in my  
24 mind that is consistent with collusive behavior and  
25 not consistent with competitive behavior.

03446

1 Q Now, you don't mind, though, if we go through  
2 this instead of taking -- is it okay if we look at  
3 each piece to see how valid that is? Is that okay  
4 with you?  
5 A I think we have to judge -- I think we --  
6 typically the way economists have to approach these  
7 things, because there are always pieces of this puzzle  
8 missing -- I have not seen any document from any of  
9 the major companies in which they explain -- there is  
10 nothing that memorializes what the presidents at this  
11 -- at least according to Hill and Knowlton, really  
12 historical meeting, what they thought was going on.  
13 Nobody wrote any memos, or at least I haven't  
14 seen any. So there are going to be missing pieces. I  
15 want to look at the whole, whatever we have, all of  
16 the evidence, and see whether in my mind, as an  
17 economist, all of the behavior that we put together is  
18 consistent with collusion or consistent with  
19 competition.

20 We can look at each piece separately, but I  
21 think ultimately I have to make my best judgment on  
22 the evidence as a whole.

23 Q So let's start with this piece. I want to  
24 make sure that we are focused on one piece at a time.  
25 We are talking about -- Doctor, did you see evidence

03447

1 that there was a change in advertising that took place  
2 in 1954, but it had nothing to do with collusion, it  
3 had to do with Dr. Wynder's publicity? Did you see  
4 any evidence of that?

5 A No. I'm not sure that I did. I saw evidence  
6 that the firms appeared to be, according to  
7 contemporaneous accounts and according to the  
8 advertisements that I saw, they appeared to be  
9 competing fairly vigorously on the basis of health  
10 claims in 1952. They were running ads that said  
11 things like, not a cough in a carload, more doctors  
12 smoke our brand, brand X won't irritate your throat,  
13 et cetera, et cetera, making claims about the  
14 healthiness of the product, and by the middle of 1954  
15 that had ceased.

16 Q My question -- I will ask it again.  
17 Did you see evidence that the reason the  
18 tobacco companies changed their advertising had  
19 nothing to do with collusion, but it had to do with  
20 publicity that resulted from Dr. Wynder's mouse  
21 painting skin study? That is my question. Did you  
22 see evidence of that?

23 MR. FERGUSON: Objection. Asked and answered  
24 it.

25 MR. WEBB: He didn't answer.

03448

1 THE COURT: Overruled.

2 THE WITNESS: I'm not sure I have seen  
3 anything directly that points in that direction. I  
4 think what I have seen is that there was concern about  
5 -- I think these are two pieces of the puzzle that fit  
6 together. The industry was concerned about the cancer  
7 scare, the mention of the things that cause you know  
8 what in the Hill and Knowlton document, I infer that  
9 "you know what" is cancer. That the industry at the  
10 time felt, certainly at the time felt that that was --  
11 that was untrue or unproven, at least given current  
12 science, and that the combination of that scare and  
13 the fact that they were doing health advertising,  
14 those two things combined contributed to the agreement  
15 to -- the ultimate agreement to cease health  
16 advertising.

17 BY MR. WEBB:

18 Q Let's tell the jury what happened. The piece  
19 of the puzzle that -- strike the question.

20 What happened -- actually Dr. Wynder's mouse  
21 painting, biological testing that connected the  
22 possibility of smoking to cancer actually was  
23 publicized in November and December of 1953, is that  
24 correct, sir?

25 A I believe that is correct.

03449

1 Q Let's look at it to be sure so there is no  
2 doubt in your mind about it.

3 A Okay.

4 Q This is actually a report of Dr. Wynder's  
5 mouse painting study. Have you seen this in  
6 connection with preparing for your testimony, sir?

7 A I'm not sure I have actually read Dr.  
8 Wynder's actual piece of science. I have certainly --  
9 I am certainly aware of what it said. But not being a  
10 scientist I haven't read the science itself.  
11 Certainly it is a well reported --

12 Q It got a lot of publicity, didn't it, Time,  
13 Look, Life, they all ran stories on this, didn't they?

14 A I believe so, yes.

15 Q This was not a little deal, this was a big  
16 deal, wasn't it, as far as supposedly connecting  
17 smoking to cancer?

18 A Yes, I believe this was an important step in  
19 that connection.

20 MR. FERGUSON: Does it have an exhibit  
21 number.

22 MR. WEBB: It does. I'm sorry, Defense  
23 Exhibit WC288.

24 MR. FERGUSON: Thank you.

25 BY MR. WEBB:

03450

1 Q I am not going to read this whole thing.  
2 This is where he reports that this -- the experimental  
3 evidence establishing cigarette tar as a mouse  
4 carcinogen is reviewed. It is emphasized that the  
5 significance of this observation does not lie in  
6 strengthening the human evidence linking smoking to  
7 lung cancer but rests chiefly in giving us a working  
8 tool to identify and possibly isolate carcinogens in  
9 tobacco tar.

10 Do you see that?

11 A I see that, yes.

12 Q In fact, if we just go over -- the idea that  
13 his conclusion here is that the experiment establishes  
14 cigarette tar as a carcinogen, at least as to mouse  
15 epidermis -- that means mouse skin, does it not?

16 A It does.

17 Q Now, this article that received all that  
18 attention, if you look down here, do you see when this  
19 report was presented to the scientific meeting, this  
20 report was presented at the annual meeting -- I don't  
21 want to get too far back, the annual meeting of the  
22 American Cancer Society in New York City, November  
23 1953.

24 Do you see that?

25 A I do.

03451

1 Q And that at the Yale Medical Society,  
2 December, what is that, 16th --

3 A 14th.

4 Q -- 14th, 1953.

5 A I see that.

6 Q Now, did you see -- now, once you told the  
7 jury -- Mr. Ferguson was asking you questions, you  
8 told the jury that -- in fact you just repeated it,  
9 that in 1952, in 1953 the cigarette companies were  
10 running ads like not a cough in a carload, things like  
11 that, is that correct?

12 A I believe we saw some of those, yes.

13 Q Let me just remind -- to show the jury one of  
14 those, that you showed the jury yourself. This is one  
15 you showed the jury. And you said these things  
16 changed. You showed the jury, this is the type of ad  
17 where -- this is Lucky Strike cigarette. They ran ads  
18 that said beware of irritation, toasting removals  
19 dangerous irritants that cause throat irritation and  
20 coughing.

21 A Yes.

22 Q Now, you do agree, do you not, Doctor, that  
23 once Dr. Wynder published the study about smoking and  
24 the possible link to cancer -- you do agree that  
25 cancer is a little more serious than throat

03452

1 irritation?

2 A Are the two clauses in that question linked?  
3 I do believe that cancer is more serious than throat  
4 irritation.

5 Q You do believe that cancer is a more serious  
6 human condition than throat irritation?

7 A I guess I would much rather have throat  
8 irritation than cancer, yes.

9 Q Thank you. And the cigarette companies had a  
10 lot more to worry about as far as their products, once  
11 Dr. Wynder's story appeared, they had a lot more to

12 worry about as far as throat irritation, they had to  
13 now deal with the allegation that smoking causes  
14 cancer, is that correct?

15 A That is correct. I think it actually started  
16 a little before the 1953 Wynder study, because the  
17 epidemiological studies that we discussed that linked  
18 smoking to cancer came out in 1950, I believe, was  
19 Doll, and also a study by Wynder that was  
20 epidemiological.

21 Q Those were statistical epidemiological studies,  
22 not biological studies, weren't they?

23 A Those were studies, I thought I heard you say  
24 was the only way to tell whether products were safe or  
25 unsafe.

03453

1 Q That is correct. When those studies came out  
2 in the 1950s scientists started to do biological  
3 research to see if they could confirm whether those  
4 statistics meant anything, is that correct?

5 A They wanted to see if they could discover a  
6 physical link between smoking and -- tobacco and  
7 cancer, yes.

8 Q And once Dr. Wynder's publicity came -- well,  
9 that's what caused the meeting at the Plaza Hotel,  
10 isn't it?

11 A I would not characterize that as such, no. I  
12 would say that is too narrow of an explanation.

13 Q Then let me ask you this. Do you think it  
14 might have been a little ridiculous for the tobacco  
15 companies to run ads after December of 1953 about  
16 throat irritation when they were being bombarded with  
17 media attention that smoking causes cancer?

18 A No. I think once they are engaged in this  
19 form of competition, it is very difficult to back out  
20 of that form of competition. Once the firms -- and  
21 they were engaged in this in 1952 before Dr. Wynder's  
22 study came out. Once they are engaged in the health  
23 advertising, it is very difficult -- I perceive that  
24 to be competitive advertising, each firm was trying to  
25 gain an advantage over its rivals by saying our

03454

1 products don't cause throat irritation. Once they  
2 were engaged in that, I think it is very difficult to  
3 pull out, because if you stop advertising that your  
4 product doesn't cause throat irritation, and everybody  
5 else is still advertising that theirs doesn't, you are  
6 saying, well, we are not making any comments about  
7 smoking and health, but the rest of the firms are  
8 saying, well, I don't care what they say, ours doesn't  
9 cause throat irritation, I think it would be very  
10 difficult to put those guns down on the table.

11 Q Actually --

12 A I don't think it is ridiculous at all as a  
13 matter of economics, no.

14 Q Doctor, you don't disagree if they stopped  
15 worrying about throat irritation and started to  
16 advertise products that might deal with cancer, would  
17 that strike you economically as a relatively smart  
18 thing for tobacco companies to do?

19 A I think if they had truthful -- if they had  
20 truthful information at the time that their products  
21 didn't cause cancer and they wanted to advertise on  
22 the basis of that, that would have been in their own

23 independent self-interest, that would have been  
24 competition. Some of the documents -- at least the  
25 second document suggests that they recognize that.

03455

1 One of the people said -- one of these research  
2 directors said -- and I take it this was a tobacco  
3 industry researcher, not a Hill and Knowlton  
4 researcher, boy, wouldn't it be wonderful if our  
5 company was first to produce a cancer free cigarette,  
6 what we could do to the competition. I think if they  
7 had that information, if they had a safer product, a  
8 truly safer product, and they had advertised it at  
9 such, that would have been a competitive thing to do.

10 Q Thank you.

11 If we look at what they actually did in 1954,  
12 the tobacco companies began to compete against each  
13 other in advertising filters that would remove tar,  
14 isn't that what actually happened, Doctor?

15 A They did, as I understand, advertise filters.  
16 I think that filters were already beginning to be  
17 advertised at that time. But the filter segment was  
18 beginning to grow. Whether those filters actually  
19 reduced tar and nicotine levels is another matter.

20 Q Whether they did or not, you are the  
21 economist trying to tell the jury -- what you want the  
22 tobacco companies to do under your economic theory is  
23 to go out and start advertising these filters because  
24 those are what address the real health problem, which  
25 was cancer, tar, isn't that correct?

03456

1 A If that's what really addresses the health  
2 problem, and if those filters really do reduce cancer,  
3 then I would expect to see them doing that. And I  
4 would expect to see them doing that on the basis of  
5 health rather than on the basis of flavor or taste or  
6 smoothness or something like that.

7 Q Let's see what they did. Let's look at the  
8 actual ads to see what actually happened.

9 A Sure.

10 Q Just so the jury is going with us, when Dr.  
11 Wynder ran the biological test results, the mouse skin  
12 painting test results, I just showed it to you, it was  
13 tar that became the focus?

14 A Excuse me. I believe that is correct.

15 Q Is that correct, sir?

16 A I believe so.

17 Q And so what the cigarette companies were  
18 doing, particularly throughout 1954, were trying to  
19 develop filters that they could advertise as more  
20 effective in removing tar from cigarettes, isn't that  
21 what happened?

22 A I'm not sure it is true that they actually --  
23 that the filters actually were more effective. In  
24 1957, as I understand it --

25 Q I am in 1954 now.

03457

1 A I am in 1957 looking back at 1954. Consumer  
2 Reports, as I understand it, ran a study of the tar  
3 and nicotine levels of various filter cigarettes and  
4 concluded that there was basically no difference among  
5 the brands. In fact, some of the filtered brands had  
6 higher levels of tar and nicotine than the unfiltered  
7 brands. So while it may have sounded like these

8 things reduced tar and nicotine, my understanding was  
9 in fact there were no real significant differences.

10 Q You just told the jury a moment ago because  
11 of the Plaza Hotel meeting these people stopped making  
12 health claims.

13 A I think that they stopped making claims about  
14 products -- you stopped seeing at that time claims  
15 that said, not a cough in a carload, less irritation,  
16 better for your throat. You saw ads about the filters  
17 -- first of all, filters had already started before  
18 the meeting. The filters were known before the  
19 meeting.

20 And secondly, the ads were about filters and  
21 taste rather than filters and cancer.

22 Q Actually, if we actually look at it, the ads  
23 that started to begin to run in 1954 were actually  
24 advertising the filters as being safer and offering  
25 more protection. It was a much more serious health

03458

1 claim than they made before, wasn't it?

2 A As I recall, the advertisements that we put  
3 up went from saying filtered for your health  
4 protection to filtered for your pleasure.

5 Q Well, let's look at some ads.

6 A Okay.

7 Q We are trying to test your theory that as a  
8 result of the Plaza Hotel meeting the cigarette  
9 companies just stopped making health claims.

10 A I wouldn't say that. I would not say it that  
11 way. I would say that they ultimately suppressed  
12 making health claims. They didn't completely  
13 eliminate making health claims. Your company, Philip  
14 Morris, the company that you represent, made a health  
15 claim about Barclay cigarettes in Holland.

16 Q Now, I am talking about --

17 A I am talking about the entire set of  
18 evidence.

19 Q Doctor, you just --

20 MR. FERGUSON: Can he finish his answer?

21 MR. WEBB: I apologize.

22 Finish your answer.

23 THE WITNESS: I am talking about putting the  
24 entire set of evidence together, and to see whether  
25 overall the behavior is consistent with collusion or

03459

1 conspiracy.

2 BY MR. WEBB:

3 Q Right. And you told the jury just a few  
4 minutes ago they actually agreed at this meeting not  
5 to make health claims.

6 A That's correct, they were going to resist  
7 making health claims.

8 Q And all I am asking you is, if they stopped  
9 saying there is not a cough in a carload, and started  
10 to make claims about filters that related to cancer  
11 and tar, they are competing even more on health  
12 claims, are they not?

13 A If they were -- if they were making claims  
14 that were truthful that said our filters -- smoke our  
15 filter cigarettes and you won't get cancer, that I  
16 would think of as being a health claim.

17 Q What if they say smoke our cigarettes and get  
18 more medical protection, is that a health claim?

19 A I would tend to think of that as a health  
20 claim, too.

21 MR. WEBB: Your Honor, I have talked to Mr.  
22 Ferguson, there are some advertisements that we had  
23 tendered and designated and the Court was not able to  
24 rule on them, because there was a variety of reasons.  
25 If there is no objection, can I read those into the  
03460  
1 record and have them admitted?  
2 THE COURT: Yes.  
3 MR. WEBB: I just talked to Mr. Ferguson  
4 about those.  
5 MR. FERGUSON: There is no objection, your  
6 Honor. I would just like to have the number for the  
7 record.  
8 MR. WEBB: The numbers are W -- Defense  
9 Exhibits WX229, Defense Exhibit -- these are all  
10 defense exhibits, WX325, WX165, WX241, WX226, WX218,  
11 WX220.  
12 I offer those into evidence.  
13 MR. FERGUSON: No objection.  
14 THE COURT: Admitted.  
15 (Exhibits WX229, WX325,  
16 WX165, WX241, WX226, WX218  
17 and WX220 were admitted  
18 in evidence.)  
19 BY MR. WEBB:  
20 Q Doctor, I am going to show you some ads that  
21 ran after the Plaza Hotel meeting and after Dr. Wynder  
22 had published his mouse skin painting. I don't know  
23 how these are going to come out here. This is  
24 actually Newsweek. I think these are the Eisenhower  
25 children.  
03461  
1 MR. BERMAN: It is Mr. Luvera and me.  
2 MR. WEBB: Somebody colored on the magazine,  
3 it looks like.  
4 THE WITNESS: They don't look very happy.  
5 BY MR. WEBB:  
6 Q Just to show you, this is April 1954. Do you  
7 see that, sir?  
8 A I do.  
9 Q And I took an ad for Kent cigarettes. Kent,  
10 by the way, is made by --  
11 A Lorillard.  
12 Q -- Lorillard.  
13 Let's show the jury, so no one forgets.  
14 Lorillard, you said actually at the end of your  
15 direct today, you reinforced that Lorillard was part  
16 of this agreement?  
17 A I think as a general matter Lorillard was a  
18 part of that agreement, although I think Lorillard was  
19 a company that tended to cheat on the agreement and  
20 felt that it was ill handled by the agreement.  
21 Q Actually this morning when Mr. Ferguson asked  
22 you a question -- he asked you, was Lorillard involved  
23 in each of these agreements, and you answered yes,  
24 didn't you?  
25 A Yes, I think they were. As I said, I will  
03462  
1 just repeat my answer, I think they were involved in  
2 each of those agreements. I think that they did tend  
3 to cheat on that agreement. We saw the evidence of



4 that in the tobacco industry -- sorry, Tobacco  
5 Institute meeting in which the cigarette advertising  
6 code administrator and lawyers got together and  
7 basically agreed amongst themselves how Lorillard  
8 would continue to advertise.

9 Lorillard withdrew from the cigarette  
10 advertising code because it felt it was being ill  
11 treated by its rivals, and it was not being allowed to  
12 compete. So I think they were in and out, but yes, I  
13 do think they were part of the agreement.

14 Q In fact, you put them right on the wheel  
15 here, is that correct?

16 A Because they were at the meeting, yes.

17 Q They were at the meeting?

18 A They were part of the meeting.

19 Q Entered into this agreement not to make  
20 health claims?

21 A Yes. As I say, I think that there is always  
22 incentives in these noncompetitive agreements to  
23 cheat. And I believe that Lorillard was part of the  
24 agreement, and I believe they cheated on it often, or  
25 pushed the limits.

03463

1 Q In any event, they entered into the agreement  
2 in December of 1953?

3 A Yes.

4 Q Let's see what they did in April of 1954.  
5 This advertisement says, here's proof Kent gives  
6 greater filter protection than any other cigarette,  
7 for the 1 in 3 who needs protection against nicotine  
8 and tars.

9 Do you see that?

10 A Yes.

11 Q Do you think that is a health claim?

12 A As I said, it is not always clear what  
13 constitutes a health claim. I tend to think of  
14 advertising on the basis of health as saying things  
15 like, this product contains fewer cancer causing  
16 compounds, this product does not include carbon --  
17 reduces carbon monoxide, which some people have linked  
18 to -- which may be bad for you, something like that.  
19 The industry on occasion has said they -- members of  
20 the industry, they felt using the word filter was a  
21 health claim. So I think we need a definition of  
22 what's a health claim.

23 Q Is that kind of a complicated definition for  
24 economists?

25 A It is kind of like President Clinton trying

03464

1 to define what sex is. I'm sorry.

2 Q Economists have as much trouble in defining  
3 health claims as --

4 A No, I think the industry -- I think the  
5 industry has as much trouble defining health claims as  
6 President Clinton has defining sex. Using the word  
7 filter or micronite, which at one point the industry  
8 felt was a health claim, or members of the industry  
9 wanting to argue was a health claim, seemed pushing  
10 the notion of health claim pretty clear -- pretty far.  
11 There is no mention of cancer, at least from what I  
12 can read here.

13 Q Doctor, all I am asking, Doctor, you  
14 recognize -- if we tried to put ourselves back in

15 1954, after the presence of tar was identified as the  
16 bad guy, the -- the reason the cigarette companies  
17 began to compete against each other with filters is to  
18 communicate -- try to communicate to the public that  
19 they were producing cigarettes that were addressing  
20 the problem?

21 A In fact that is what they were doing. As I  
22 suggested, the evidence at the time suggested in fact  
23 there were no significant differences in tar and  
24 nicotine. And so this was a statement, it had an  
25 image that it was better. As I said, Consumer Reports  
03465

1 -- I think Consumer Reports actually noted that Kent  
2 was the one brand that really did seem to be  
3 different, but the others, generally speaking, were  
4 not measurably different, and in fact some of the  
5 filtered cigarettes had the same or more tar and  
6 nicotine than the unfiltered versions of those  
7 cigarettes.

8 Q We can get to --

9 A If it is true that the filter reduced tar and  
10 nicotine, and my understanding is I believe in the  
11 Kent case at that point in time it was true, but that  
12 may have been the only one, that they were making a  
13 truthful statement here.

14 Q And we can get into later whether it is  
15 truthful or not, but the point is, you are trying to  
16 tell the jury they didn't compete on health claims,  
17 and my question is, the fact that they are even  
18 running ads that talk about reducing nicotine --  
19 reducing tars, the reason the tobacco companies began  
20 to run these ads was to compete on health claims,  
21 isn't it?

22 A I believe it is to compete on selling filter  
23 cigarettes.

24 Q And filter cigarettes were designed to deal  
25 with the problem, were they not?

03466

1 A That remains to be seen, whether they  
2 actually dealt with the tar problem or not, at least  
3 at that point in time.

4 Q Let's see what they said. It says for one in  
5 three who needs protection. Let's go on and see what  
6 they said in more detail here.

7 It says here, according to published medical  
8 reports about 1 in every 3 smokers are sensitive to  
9 nicotine and tars and tobacco smoke. He needs the  
10 protection of a filter cigarette and wants the full  
11 satisfying flavor of fine tobaccos.

12 Do you see that?

13 A I do.

14 Q Do you think that is a health claim?

15 A That is getting pretty close to being a  
16 health claim.

17 Q Doctor, yesterday you told me just putting  
18 down low in gas was a health claim, or you told Mr.  
19 Ferguson that, didn't you?

20 A No, I think I actually said when you go  
21 through the whole advertisement, the advertisement  
22 that said low in gas was a health -- the advertisement  
23 said a lot more than low in gas, it said this is  
24 something people are concerned about, and if you are  
25 concerned about it here is an option for you.

03467

1 I would say that that's -- by most reasonable  
2 definition that is a health claim.

3 Q Let's go on to see. It gets a little better  
4 here. They go on to say -- they are saying there are  
5 9 leading brands of filter cigarettes a sensitive  
6 smoker can choose from. That's the type of  
7 comparative advertising you are looking for, where  
8 they compare their cigarettes, that is called  
9 competition, isn't it?

10 A I would say that is competitive advertising.  
11 If it is truthful, I would say that is competitive  
12 advertising.

13 Q There are 9 leading brands of filter  
14 cigarettes a sensitive smoker can choose from. They  
15 look pretty much alike. Their claims may even sound  
16 alike. Which one definitely offers you the greatest  
17 protection and can prove it.

18 A That's correct.

19 Q So then they go on and describe the test they  
20 perform. And they actually show you that, this is one  
21 of the members of the conspiracy that wasn't going to  
22 advertise health claims, is saying here that here is  
23 your proof as shown to millions of TV viewers, notice  
24 that all leading filter cigarettes rely on just three  
25 different types of filter material.

03468

1 And then they say here, four puffs each, from  
2 Kent and from two other leading filter cigarettes, are  
3 drawn into test glasses and allowed to settle.

4 Now, that is comparative advertising on  
5 health, Doctor?

6 A Yes, although the other two brands aren't  
7 mentioned. But, yes.

8 Q It is kind of hard to see in this copy. But  
9 they go to show you the results. And they basically,  
10 see the irritants come right through ordinary types of  
11 filter cigarettes leave harsh, ugly stains. But from  
12 Kent hardly a trace. That's because Kent has the  
13 exclusive micronite filter, the safest, most effective  
14 filter material ever used on a cigarette.

15 Do you see that?

16 A Yes.

17 Q In fact, they cap this off by going down here  
18 and saying, if you need the protection of a filter  
19 cigarette, get Kent, the cigarette that takes out far  
20 more nicotine and tars than any other filter  
21 cigarette, old or new.

22 Do you see that?

23 A Yes.

24 Q If that's all they had said, if all they had  
25 said is that they had produced a filter that takes out

03469

1 more tar and nicotine than any other filter cigarette,  
2 that would be a health claim, wouldn't it, Doctor?

3 A I think people could interpret that as a  
4 health claim, yes.

5 Q Have you studied the Federal Trade  
6 Commission's reaction as to these ads, as part of your  
7 testimony in this case?

8 A Yes, I have.

9 Q And the Federal Trade Commission, after these  
10 ads ran for a few months, the Federal Trade Commission

11 stepped in in September of 1954 and told them -- the  
12 Federal Trade Commission started to object to these as  
13 making health claims?

14 A I think what the Federal Trade Commission  
15 said is, if you run an ad that you cannot substantiate  
16 you may get -- you may get charged with deceptive  
17 advertising.

18 Q Didn't the Federal Trade Commission actually  
19 try to stop these type of filter comparison ads?

20 A I think what the Federal Trade Commission did  
21 was to state that its attitude towards these ads is  
22 that it did not believe that they could be  
23 substantiated. It didn't believe that they were truth  
24 necessarily.

25 And if you could not substantiate them --

03470

1 they put the industry on warning that if they made  
2 claims like this -- the FTC didn't believe could be  
3 backed up that they would then want to start  
4 proceedings to charge the companies with making  
5 deceptive advertising.

6 Q We will talk about the FTC. Let's get  
7 through the ads and we will go to the FTC. In fact,  
8 they capped off this advertisement, it looks to me  
9 like, with the finale, Kent, for the greatest filter  
10 protection in cigarette history.

11 A Yes.

12 Q That's Lorillard.

13 A That was April of 1954?

14 Q April of 1954. Another member of the group  
15 that you -- actually you told the jury about  
16 yesterday, but I guess -- you didn't write on, United  
17 States Tobacco on here?

18 A No, I didn't. Probably should have.

19 Q Okay. I won't add them, but you told the  
20 jury that U.S. Tobacco was at this meeting and entered  
21 into this agreement?

22 A Yes.

23 Q Let's look at what U.S. Tobacco said in June  
24 of 1954 in an ad that they ran. This is actually  
25 taken out of a Boston newspaper. Let me see if I can

03471

1 get in and get that date for you. Can you see the  
2 date. It is June 19, 1954?

3 A Yes. June 9th.

4 Q Let me get this right so you can see it. Is  
5 that June 9th?

6 A That's what I think it is.

7 Q This is actually an ad, never before, so much  
8 cigarette with so little nicotine or tar in every  
9 puff. And they go on -- this is a brand called King  
10 Sano?

11 A King Sano.

12 Q Sano, S-a-n-o?

13 A Yes.

14 Q Let's see what they say here. When you smoke  
15 new King Sanos you get less nicotine, you get less tar  
16 than you get in the smoke of any other cigarette.

17 Do you see that?

18 A I do.

19 Q Is that the type of comparison advertising  
20 you are trying to see between the tobacco companies?

21 A If it is truthful, yes.

22 Q Let's look at another one. I think this is  
23 my client's, Philip Morris.  
24 A By the way, I would at least remind you what  
25 happened to U.S. Tobacco when they made those claims  
03472  
1 to the health community, to doctors.  
2 Q We will go through that episode.  
3 A Good.  
4 Q I am now trying to look at ads to see whether  
5 your testimony concerning these health claims stopped  
6 after the Plaza Hotel, we are trying to test that  
7 theory out here.  
8 A Yes. Or at least was reduced after that  
9 meeting, yes.  
10 Q This actually is an article. This is Monday,  
11 September 13th, 1954. This is actually the Seattle  
12 Times.  
13 Do you see that?  
14 A I do.  
15 Q And I have to come back out here so can you  
16 see it. This is actually for -- it says new lower  
17 prices, King size, and then we have to go to the next  
18 page, to see the rest of the ad. It is for  
19 Parliament.  
20 Do you see that?  
21 A Yes.  
22 Q And let's see -- let's try to hone in.  
23 Parliament is part of Benson & Hedges and purchased by  
24 Philip Morris, did you come to learn that?  
25 A Yes. It wasn't purchased by Philip Morris at  
03473  
1 this point in time, though.  
2 Q It was purchased earlier in 1954?  
3 A Oh, it was? I'm sorry. I was not quite  
4 aware of the date.  
5 Q So Philip Morris says, now Parliament's  
6 matchless combination of pleasure, plus extra  
7 protection is yours in king size at a new lower price.  
8 Now, that plus extra protection, is that the type of  
9 ads that started to run about filter cigarettes as  
10 tobacco companies were trying to make health claims  
11 about the protection that filters gave to smokers?  
12 A It is not entirely clear what that is  
13 protection from. It certainly doesn't say protection  
14 from cancer. It says protection from something.  
15 Q Pleasure. Here it says, extra protection.  
16 Only Parliament of all leading filter cigarettes gives  
17 the important extra protection of a custom made filter  
18 recessed in the mouthpiece, trapped tars and nicotine  
19 can never touch your limits or teeth.  
20 Yes, today's king size Parliament is the  
21 finest value in filter cigarette history. And they go  
22 on. Certificate filed for superior filtering  
23 efficiency by the U.S. Testing Company.  
24 Is that the type of comparative ads that you  
25 thought had stopped running after the Plaza Hotel  
03474  
1 meeting?  
2 A No, that is an ad -- that is a tar and  
3 nicotine ad. It doesn't say anything about better for  
4 you. It doesn't say anything about -- it doesn't  
5 cause cancer, doesn't cause throat irritation, doesn't  
6 cause smoker's cough. It says lower tar and nicotine.

7 I will say it says lower tar and nicotine.  
8 Q And you are aware that the reason the tobacco  
9 companies began to advertise lower tar and nicotine  
10 was to respond to the health concerns about  
11 cigarettes, and to appeal to the health conscious  
12 consumer? Isn't that what the literature reflects,  
13 sir?

14 A I thought the tobacco industry didn't believe  
15 there was any harm from smoking whatsoever. They felt  
16 this was an unfair attack.

17 Q Sir, are you aware that the tobacco  
18 companies, while they believed it was an unfair attack  
19 -- did you see evidence that the tobacco companies  
20 started doing research and development to find a way  
21 to reduce tar levels in cigarettes in case the  
22 scientific community was correct about that?

23 A I believe that they tried to reduce tar and  
24 nicotine, that's correct.

25 Q That is a responsible thing for a corporation  
03475  
1 to do, isn't it?

2 A If in fact it reduces the amount of illness  
3 that consumers get, yes, it would be.

4 Q And tar is what Dr. Wynder said was causing  
5 the problem, didn't he?

6 A Yes.

7 Q Let's look at another company. This one is  
8 actually Tareyton, which is manufactured by American.  
9 American is part of this agreement you just told us,  
10 is that correct?

11 A Yes.

12 Q And you wrote their name on the chart here?

13 A Yes.

14 Q It says filter tip smokers, here's the true  
15 tobacco taste you have been looking for. Herbert  
16 Tareyton with the new selective filter and famous  
17 Tareyton quality gives you real filtration and smoking  
18 satisfaction.

19 Do you see that, sir?

20 A Yes.

21 Q We will go down and try to come in on this a  
22 little bit. Tareyton's new selective filter has  
23 unusual powers of selectivity which hold back elements  
24 that can detract from the pleasure of smoking. They  
25 identified the best in filtered smoking. They go on  
03476

1 to talk about an entirely new concept of American  
2 filtration. A filter tip of purified cellulose,  
3 incorporating activated charcoal, a filtering  
4 substance world famous as a purifying agent, notably  
5 for air, water and beverages. A superior filter at a  
6 popular price.

7 Do you see that, sir?

8 A I saw that, yes.

9 Q Was --

10 A Before we put that one away so quickly, I'm  
11 not sure I saw a health claim in that one.

12 Q Sir, when they start advertising -- during  
13 that time period when they started to advertise filter  
14 cigarettes -- today's new selective filter has natural  
15 powers --

16 A Unusual powers.

17 Q Unusual powers of filtration which hold back

18 elements that can detract from the pleasure of  
19 smoking. You don't believe that is trying to appeal  
20 to health conscious people that may want to have a  
21 filter cigarette? You don't think that is a health  
22 claim?

23 A I think that is -- again, we have a question  
24 of how exactly we are going to define health claim.  
25 But that seems to be to be a claim of pleasure of

03477

1 smoking, not the health of smoking.

2 Q At this time when the tobacco companies began  
3 to advertise filters, just advertising the filter at  
4 this point in time was clearly an effort to appeal to  
5 the health conscious segment of the community, isn't  
6 it?

7 A I don't know. It seems to me -- it seems to  
8 me that what you have just suggested is that you agree  
9 with the proposition by the industry that advertising  
10 a cigarette that has a filter is a health claim. I am  
11 just making a layman's judgment. I read that ad -- I  
12 read that as an ad that says you should smoke this  
13 filter because it makes the smoking more pleasurable,  
14 not because it makes it safer. That is the only thing  
15 I wanted to say about that ad.

16 Q It says holds back elements that can detract  
17 from the pleasures of smoking. You don't think that  
18 was to appeal to the health conscious people?

19 A Perhaps it was, perhaps it wasn't. It seems  
20 to me when I read that ad, it was aimed at the  
21 pleasure conscious people. Some things might taste  
22 bad, and this filter takes those things out. The  
23 other ones mentioned tar and nicotine, of this set  
24 that you are offering, this one seems a little  
25 different.

03478

1 Q Let me just ask. As far as these companies  
2 competing against each other on health claims, there  
3 is clearly greater competition on health by  
4 advertising filters at this point than saying that  
5 they are going to get the irritation out of your  
6 throat, isn't it?

7 We have established cancer is a little more  
8 serious than throat irritation, is that correct?

9 A That's correct.

10 Q And the filters were designed to reduce tar?

11 A Not -- this ad says nothing about tar, I'm  
12 sorry.

13 Q This ad says new selective filter has unusual  
14 powers of selectivity which can hold back the  
15 elements. They don't use the word tar, is that what  
16 you are saying?

17 A That is certainly a true statement.

18 Q Let's look at the next one. This is Time  
19 magazine, September. Do you see that, September 1954?

20 A Yes.

21 Q Can you see that?

22 A Yes.

23 Q I don't know who that is. L&M. Now king  
24 size or regular. Both same low price. It is the  
25 filter that counts. And L&M has the best. It says in

03479

1 either size only L&M filters give you the miracle tip,  
2 the effective filtration that you need. Just what the

3 doctor ordered.  
4 Do you see that, sir?  
5 A I do.  
6 Q Do you think that is a health claim?  
7 A Yes, it is a health claim. That is a health  
8 claim made by Liggett & Myers which I believe at this  
9 point was not a member of the conspiracy.  
10 Q Just so I know, because I guess you said you  
11 weren't there in 1954?  
12 A Yes.  
13 Q How is it you figure out when these people  
14 come in and out of this conspiracy, this arrangement  
15 you are talking about? How did you come to those  
16 conclusions as an economist?  
17 A From reading accounts of the time. In one of  
18 the documents there is a mention of wanting to -- Hill  
19 and Knowlton writes about how they want to get Liggett  
20 & Myers and some of the smaller companies to be part  
21 of the agreement.  
22 I think people who have written about this  
23 and internal documents indicate that Liggett & Myers  
24 chose not to be -- chose not in 1954 to be part of  
25 this arrangement.

03480

1 Q So when did they join?  
2 A I don't know for certain.  
3 Q Then you don't know whether they were in or  
4 out on this date, I take it?  
5 MR. FERGUSON: Objection. Interrupting, your  
6 Honor.  
7 THE COURT: Go ahead if you are not done.  
8 THE WITNESS: My understanding is at the time  
9 of the Plaza Hotel meeting Liggett & Myers chose not  
10 to take place in this arrangement, chose -- they felt  
11 that the proper approach was to ignore the issue, and  
12 they did not take part.  
13 So my opinion, based on things that I have  
14 read is that Liggett & Myers was not part of the  
15 arrangement in 1954, and that agreement was a -- that  
16 advertisement was a Liggett & Myers advertisement.

17 BY MR. WEBB:

18 Q I am just curious, when did they join, sir?  
19 A I'm not certain. I believe they came in for  
20 a while -- I know they came into the Center for  
21 Tobacco Research for a while in the 1960s. But I  
22 think Liggett & Myers has always been on the edge of  
23 this agreement, that Liggett & Myers took a very  
24 different approach to the cancer and smoking issue  
25 than the other firms did. They did ultimately choose

03481

1 not to produce their safer cigarette, as I said, I  
2 believe because they were pressured by the rest of the  
3 industry not to do that.  
4 Q Do you know whether they were in or out in  
5 September of 1954?  
6 A I believe they were out in September of 1954.  
7 Q And you base that on some document have you  
8 seen?  
9 A On things I have read, yes.  
10 Q Like what?  
11 A I can't recall as I sit here.  
12 Q Thank you.  
13 A If I think of it, I will let you know.



14 Q If you think of it let me know?  
15 A If you don't mind, I will take a quick look  
16 here and see if -- this is the background material on  
17 the cigarette industry client, the December 15th Hill  
18 and Knowlton document. It says on the first page,  
19 Liggett & Myers is not participating in the  
20 organization because that company feels that the  
21 proper procedure is to ignore the whole controversy.  
22 And then I think subsequently, and I can't  
23 remember which of the two it was, but I recall as I  
24 scan this -- I think it may be the one I saw for the  
25 first time just now. This is the notes of the minutes

03482

1 of the second meeting at the Plaza Hotel.  
2 Q That is in December of 1954?  
3 A December of 1953.  
4 Q I mean 1953.  
5 A Two weeks after the first meeting.  
6 Additional members, present members of the committee  
7 will approach Liggett & Myers and smaller  
8 nonparticipating companies as well as a representative  
9 of the association which represents the smaller  
10 producers. And it goes on. The advertisement program  
11 will go ahead whether or not these companies join.  
12 So I think that is consistent with my view  
13 that Liggett & Myers at least in 1954 was not part of  
14 the arrangement.  
15 Q I misunderstood. What document tells you  
16 they weren't there in September -- nine months later  
17 in 1954?  
18 A Other things I have read suggested that they  
19 stayed out for quite some time.  
20 Q What things are those?  
21 A I can't recall as I sit here right now. I  
22 would have to think about it.  
23 Q Well, can you tell me tomorrow?  
24 A If I can come up with it, I will.  
25 Q Let's look at another. This is Life

03483

1 magazine, October 1954. Do you see that?  
2 A Yes.  
3 Q Let's see. This is another Lorillard  
4 commercial. The difference in price is just a few  
5 pennies, the difference in protection is priceless.  
6 Do you see that?  
7 A Yes.  
8 Q Do you think that is trying to appeal to the  
9 health conscious community?  
10 A It could be.  
11 Q It says, only Kent goes to the extra -- I  
12 can't even read it, goes to the extra expense to  
13 protect you with microscopic filtering. Kent's  
14 exclusive -- let me try to get in on that. Kent's  
15 exclusive filter removes millions, yes, millions of  
16 microscopic nicotine and tar particles that slip right  
17 through conventional filters.  
18 That's the type of comparative advertising  
19 you said you want to see, is that correct?  
20 A If it is truthful and it is actually  
21 informative to the public, yes.  
22 Q I thought you said they just -- whether it is  
23 truthful or not, I thought you just said they stopped  
24 running these altogether?

25           A       I don't think I said they stopped running  
03484  
1    them altogether. I said that they were trying to stop  
2    doing this advertising in a variety of episodes over  
3    the course of time in which they did.

4           You obviously have found some advertising in  
5    which they did advertise -- some health advertising  
6    was still going on.

7           Commentators of the time said that the health  
8    scare had pretty much ended by June of 1954.

9           Q       Didn't those commentators say they had  
10   stopped running the cough in the carload type health  
11   claim and they switched to another type of health  
12   claim?

13          A       That is not my recollection of what they  
14   said.

15          Q       Let's --

16          A       My recollection of what they said, what the  
17   Business Week of the time said and so forth, is that  
18   the health scare was over and that the tobacco  
19   industry had gone back towards taste and pleasure and  
20   so forth in their advertising.

21          Q       These do not seem to support that?

22          A       Some of these do not.

23          Q       And this goes on to say that's why Kent's  
24   micronite filter takes out more nicotine and tars than  
25   any other leading filter cigarette.

03485  
1                   Do you see that?

2           A       Yes.

3           MR. WEBB: Judge, I can --

4           THE COURT: We will break for the day. We  
5   will see you tomorrow.

6           (Evening recess.)

03486  
1  
2   STATE OF WASHINGTON                    )  
3   COUNTY OF KING                        )  
4   \_\_\_\_\_  
5  
6

7           We, James D. Lavielle, RPR, CSR, Barry Fanning,  
8   RPR, Official Court Reporters for the Superior Court,  
9   State of Washington, hereby certify that the foregoing  
10   comprises a full, true and correct transcription of my  
11   stenographic notes taken in the above-entitled cause.

12  
13  
14                   Dated this 21st day of October, 1998.

15  
16                                   OFFICIAL COURT REPORTER

17  
18  
19                                   \_\_\_\_\_  
20                                   James D. Lavielle, RPR, CSR

21                                   \_\_\_\_\_  
22                                   Barry Fanning, RPR, CSR

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